Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

MIDWEST MOTOR EXPRESS, INC.,
MME, INC., MIDNITE EXPRESS, INC.
and EXPRESS CARTAGE, INC.,
Petitioners,

v.

CENTRAL STATES SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Eighth Circuit's judgment in this case presents fundamental issues of jurisdiction and procedure concerning the collection of withdrawal liability under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1368, as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§ 1381-1461.

1. Whether a multiemployer pension plan may file a MPPAA withdrawal liability action before the plan has served notice on the employer, before the debt becomes due, before the employer has an opportunity to cure, and before the employer is in default?

2. Whether the district courts and courts of appeals should determine where subject matter jurisdiction first attached, by looking beyond the jurisdictional allegation in the complaint to the jurisdictional facts contained in the complaint before they apply the first-filed rule?

PARTIES TO THE PROCEEDING

Petitioners, who are part of the control group that would be liable for any withdrawal liability under MPPAA are:

1. Midwest Motor Express, Inc.
2. MME, Inc.
3. Midnite Express, Inc.
4. Express Cartage, Inc.

Pursuant to Supreme Court Rule 29.6, petitioners declare that MME, Inc., a privately held company, is the parent company of the other above-named petitioners.

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PETITION FOR WRIT OF CERTIORARI

Midwest Motor Express, Inc., MME, Inc., Midnite Express, Inc., and Express Cartage, Inc. ("Midwest") petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-7a) is reported at 70 F.3d 1014. Neither the opinion of the district court (App. 8a-10a) nor of the magistrate judge (App., 11a-15a) was published.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1996, as corrected December 21, 1996. App., 1a-7a. The timely petition for rehearing was denied on December 22, 1996. *Id.* at 16a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)(1948).

STATUTES INVOLVED

1. The Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1368 (1974), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§ 1381-1461 (1980), provides in pertinent part:

> **§ 1382. Determination and collection of liability; notification of employer.** When an employer withdraws from a multiemployer plan, the plan sponsor, in accordance with this part [29 U.S.C. §§ 1381 et seq.], shall—
>
> (1) determine the amount of the employer's withdrawal liability,
>
> (2) notify the employer of the amount of the withdrawal liability, and
>
> (3) collect the amount of the withdrawal liability from the employer.
>
> * * * *
>
> **§ 1399b. Notification, demand for payment, and review upon complete or partial withdrawal by employer**. (1) As soon as practicable after an employer's complete or partial withdrawal, the plan sponsor shall—
>
> (A) Notify the employer of—
>
> (i) the amount of the liability, and
>
> (ii) the schedule for liability payments, and

(B) Demand payment in accordance with the schedule.

(2)(A) No later than 90 days after the employer receives the notice described in Paragraph (1), the employer—

(i) may ask the plan sponsor to review any specific matter relating to the determination of the employer's liability and the schedule of payments,

(ii) may identify any inaccuracy in the determination of the amount of the unfunded vested benefits allocable to the employer, and

(iii) may furnish any additional relevant information to the plan sponsor.

(B) After a reasonable review of any matter raised, the plan sponsor shall notify the employer of—

(i) the plan sponsor's decision,

(ii) the basis for the decision, and

(iii) the reason for any change in the determination of the employer's liability or schedule of liability payments.

(c) Payment requirements; amount, etc. (1)(A)

(i) Except as provided in subparagraphs (B) and (D) of this paragraph and in paragraphs (4) and (5), an employer shall pay the amount determined under section 4211 [29 U.S.C. § 1391], adjusted if appropriate first under section 4209 [29 U.S.C. § 1389] and then under section 4206 [29 U.S.C. § 1386] over the period of years necessary to amortize the amount in level annual payments determined under subparagraph (C), calculated as if the first payment were made on the first day of the

> plan year following the plan year in which the withdrawal occurs and as if each subsubsequent payment were made on the first day of each subsequent plan year. Actual payment shall commence in accordance with paragraph (2).

* * * *

(2) Withdrawal liability shall be payable in accordance with the schedule set forth by the plan sponsor under subsection (b)(1) beginning no later than 60 days after the date of the demand notwithstanding any request for review or appeal of determinations of the amount of such liability or of the schedule.

* * * *

(5) In the event of a default, a plan sponsor may require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest on the total outstanding liability from the due date of the first payment which was not timely made. For purposes of this section, the term "default" means—

> (A) The failure of an employer to make, when due, any payment under this section, if the failure is not cured within 60 days after the employer receives written notification from the plan sponsor of such failure. . .

* * * *

§ 1401 Resolution of Disputes.

(a) Arbitration proceedings; matters subject to arbitration, procedures applicable, etc. (1) Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 4201 through 4219 [29 U.S.C. § 1381-1399] shall be resolved through arbitration. Either party may initiate the arbitration proceeding within a 60-day period after the earlier of—

(A) The date of notification to the employer under section 4219(b)(2)(B) [29 U.S.C. § 1399(b)(2)(B)], or

(B) 120 days after the date of the employer's request under section 4219(2)(A) [29 U.S.C. § 1399(b)(2)(A)].

The parties may jointly initiate arbitration within the 180-day period after the date of plan sponsor's demand under section 4219 (b)(1) [29 U.S.C. § 1399(b)(1)].

* * * *

(b) Alternative collection proceedings; civil action subsequent to arbitration award; conduct of arbitration proceedings. (1) If no arbitration proceeding has been initiated pursuant to subsection (a), the amounts demanded by the plan sponsor under section 4219(b)(1) [29 U.S.C. § 1399(b)(1)] shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.

(2) Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action, no later than 30 days after the issuance of an arbitrator's award, in an appropriate United States district court in accordance with section 4301 [29 U.S.C. § 1451] to enforce, vacate, or modify the arbitrator's award.

* * * *

§ 1451. Civil actions.

(a) Persons entitled to maintain actions. (1) A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle [29 U.S.C. §§ 1381 *et seq.*] with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective

bargaining, may bring an action for appropriate legal or equitable relief or both.

* * * *

(b) Failure of Employer to Make Withdrawal Liability Payment within Prescribed Time. In any action under this Section to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment within the time prescribed shall be treated in the same manner as a delinquent contribution (within the meaning of section 515 [29 U.S.C. § 1145]).

* * * *

(f) Time Limitations. An action under this section may not be brought after the later of—

(1) Six years after the date on which the cause of action arose. . .

2. The federal change of venue statute, 28 U.S.C. § 1404 (1948) states:

§ 1404. Change of Venue.

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought

INTRODUCTION AND STATEMENT OF THE CASE

This case presents both a critical threshold question defining when a cause of action accrues under MPPAA, and an important and frequently recurring issue in cases where the first-filed rule is invoked to transfer venue under 28 U.S.C. § 1404.

This case provides an ideal vehicle for this Court to resolve these questions because it is undisputed that Central States Southeast and Southwest Areas Pension Fund ("Central States") filed its Action (hereinafter referred

to as "Collection Action") (App., 18a-22a) prematurely. Accordingly, the decision below turns entirely on the following legal question: whether a litigant may establish jurisdiction in the forum of its choice by filing a premature action in violation of the statutory procedures of MPPAA and the first-filed rule.

The split of authority centers on precisely the issue presented in this case, *viz.*, whether a district or appellate court must make a threshold examination of jurisdiction. Eight courts of appeals have addressed this question, reaching incompatible results. Unless the first-filed rule is uniformly applied, litigants will obtain disparate treatment merely because of their choice of forum. Review by this Court is, therefore, needed to restore nationwide uniformity on a question of great practical consequence to litigants and the courts and to maintain just decisions on the merits.

STATEMENT OF THE FACTS

This case concerns an attempted collection of withdrawal liability by Central States against Midwest, under ERISA, as amended by MPPAA.

Founded in 1938, Midwest is a privately owned corporation duly organized and existing under the laws of the State of North Dakota. Its principal place of business is in Bismarck, North Dakota. Between November 1, 1939 and April 1, 1991, Midwest engaged in multiemployer bargaining with the International Brotherhood of Teamsters, Chauffeurs, Warehouseman and Helpers of America ("Teamsters" or "Union") and during much of that period was bound by the terms of a series of collective bargaining agreements.[1]

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[1] Between 1964 and March 31, 1991, Midwest was bound by the provisions of the National Master Freight Agreement and Central States Area Local Cartage Supplemental Agreement and the National Master Freight Agreement and Central States Area Over-The-Road Motor Freight Supplement, which were multiemployer collective bargaining agreements between Midwest and the Teamsters.

Under those collective-bargaining agreements, Midwest made pension contributions to Central States from February 1, 1955 to August 12, 1991. Midwest's last collective bargaining agreement expired on March 31, 1991. For the first time since the 1930's, Midwest engaged in single-employer bargaining.[2] When those negotiations reached impasse, the Union struck Midwest on August 12, 1991. At that time, Midwest ceased making its pension contributions to Central States, in accordance with Article III, Section 1, "Amount of Contribution," of Midwest's 1991 Trust Agreement with Central States.[3]

Nevertheless, on December 10, 1991, Central States mailed Midwest a Notice and Demand for Withdrawal Liability after Midwest legally had suspended its contributions to Central States during the strike. On March 5, 1992 Midwest informed Central States that there had been no permanent cessation of Midwest's obligation to contribute under the plan. Central States' refused to accept Midwest's explanation that there had been no permanent cessation of its obligation to contribute. Midwest then was forced to seek declaratory and injunctive relief in federal court. In May 1992, Central States rescinded its withdrawal liability assessment against Midwest. Based on Central States' action, Midwest agreed to dismiss the action without prejudice. Midwest and the Teamsters continued collective bargaining.

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[2] Midwest entered single-employer bargaining because it could no longer afford the wage costs, fringe benefit costs, and the work rule restrictions contained in previous multiemployer agreements and, at the same time, remain competitive in its regional market. Efforts to negotiate a new collective bargaining agreement started on May 31, 1991, and continued on various dates thereafter.

[3] Under this section of the Central States Trust Agreement, Midwest was not required to make contributions during a strike following contract termination, unless the parties agreed otherwise, and, thus, the cessation of contributions was expected to be temporary. Midwest also was permitted by law to suspend contributions to Central States during its labor dispute. *See* 29 U.S.C. § 1398(2) (1980).

On January 13, 1994, a Midwest employee in Fargo, North Dakota, filed a petition with the National Labor Relations Board ("NLRB") to request an election to decertify the Union as the bargaining agent for Midwest. On April 1, 1994, Midwest's employees voted to decertify the Union. On April 15, 1994, the NLRB certified the election results. Midwest took no action to initiate or to affect the decertification process that ended the labor dispute. Furthermore, Midwest conducted no campaigning activity.

On April 26, 1994, Central States filed, but did not serve, its Collection Action against Midwest in the Northern District of Illinois. That action sought to collect withdrawal liability even though Central States had not yet served Midwest with its Notice and Demand of Withdrawal Liability (App., 23a-25a) and, as of that date, no withdrawal liability was due and owing under MPPAA. Midwest did not receive that Notice and Demand of Withdrawal Liability, dated April 26, 1994, until April 27, 1994. At that time, Midwest was still unaware that Central States had filed the premature Collection Action in Illinois.

On May 4, 1994, in timely response to Central States' notice, Midwest filed suit in the United States District Court for the District of North Dakota. It again sought declaratory and injunctive relief and raised constitutional issues.[4] That suit ultimately led to the appeal in the Eighth Circuit which is the subject of this petition. App. 1a-7a. The Complaint was served on Central States on

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[4] Midwest challenged the constitutionality of MPPAA on the grounds recognized by Justices O'Connor and Powell in their concurrence in *Connolly v. Pension Benefit Guarantee Corp.*, 475 U.S. 211, 228-236 (1986) (O'Connor, J., concurring) and by Justice O'Connor in *Concrete Pipe and Products of California, Inc. v. Construction Laborers' Pension Trust for Southern California*, 508 U.S. 602 (1993) (O'Connor, J., concurring).

May 6, 1994. Three days later, on May 9, 1994, Midwest received a Notice of Lawsuit and Request for Waiver of Service of Summons, together with a copy of the Complaint in Central States' prematurely-filed Collection Action.

Proceedings in the District Court

Midwest sought to dismiss Central States' premature Collection Action or, in the alternative, to have it transferred to the District of North Dakota. Central States filed a motion in the North Dakota District Court to transfer venue to the Northern District of Illinois in an effort to force Midwest to litigate its claims in Central States' carefully chosen forum. Despite Midwest's contention that Central States' Collection Action was premature, the magistrate judge in North Dakota granted Central States' transfer motion, on the basis that the Collection Action "was filed first." App., 14a.[5]

On August 2, 1994, Midwest appealed that order to the Honorable Patrick A. Conmy, once again pointing out the jurisdictional problem created by Central States' violation of MPPAA's collection procedures. Nevertheless, Judge Conmy upheld the judge's decision and granted Central States' motion to transfer venue, holding that:

> At this stage the Illinois action is the 'first filed' action. The North Dakota case is not meaningfully 'further along' and the two cases involve the same issues. Moreover, the Court is reasonably certain that the Illinois court is more familiar with the 'angles' and 'ins and outs' of Employee Pension Fund Law.

App., 10a.

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[5] The Magistrate Judge also dismissed all pending motions without prejudice, including Midwest's Motion for a Preliminary Injunction.

Proceedings in the Court of Appeals

Midwest filed its Notice of Appeal to the Eighth Circuit, pursuant to 28 U.S.C. § 1292(a)(1) because the District Court denied a request for an injunction. The court issued its decision affirming the order of the North Dakota District Court on December 4, 1994. The opinion held that Midwest's request for a threshold examination of the jurisdictional facts in the Collection Action was a request for a determination on the merits, rather than an examination of jurisdiction and, therefore, Central States' Collection Action was the first filed. App., 5a. Essentially, the Eighth Circuit accepted Central States' allegation of jurisdiction on its face despite Midwest's jurisdictional challenge. *Id.*

Midwest timely filed its Petition For Rehearing With Suggestion For Rehearing En Banc. The Eighth Circuit denied both requests. App., 16a. Midwest, filed a motion to stay the mandate of the Eighth Circuit, which was granted. App., 17a.

REASONS FOR GRANTING THE PETITION

The judgment below conflicts with decisions of four other courts of appeals and the district courts in another circuit on an important, recurring question of special practical importance to litigants under MPPAA. Specifically, it allows a pension plan to file a collection claim for withdrawal liability against an employer before it has given the employer the requisite statutory notice and demand and before any default has occurred from which a cause of action could accrue.

Additionally, the decision below conflicts with decisions of seven courts of appeals because it fails to analyze the jurisdictional fact allegations and permits Central States to establish jurisdiction under the first-filed rule on the strength of nothing more than its conclusory jurisdictional allegation in its complaint.

Guidance from this Court is plainly needed to ensure nationwide uniformity on the important issue whether a plan attempting to initiate a MPPAA collection action may ignore specified statutory procedural requirements that are preconditions to filing suit in order to select the forum of its choice. Moreover, the absence of factual disputes on the critical issues in this case offers an ideal record for this Court's consideration.

I. THE CIRCUIT COURT'S DECISION CONFLICTS WITH THE DETERMINATION BY OTHER CIRCUITS THAT MPPAA'S STATUTORY PROCEDURES AND OTHER REQUIREMENTS MUST BE FOLLOWED IN COLLECTION ACTIONS.

Every circuit that has addressed the issue squarely, except for the Eighth Circuit in this instance, has held that a MPPAA cause of action accrues only after proper notice and demand have been made and after a default in the demanded payment occurs on the 61st day after demand is made. For example, the Second Circuit remanded a case for determination of "whether the conditions precedent to a suit for collection of withdrawal liability have been met." *ILGWU Nat'l Retirement Fund v. Levy Bros. Frocks*, 846 F.2d 879, 887 (2d Cir. 1988).[6]

The Third Circuit held that:

> the cause of action arose from the date upon which the employer failed to make a payment on its withdrawal liability demanded by the plan sponsor. . . . the action that "adversely affected" the plan was the failure to make the scheduled payment, and that therefore the cause of action accrued at that time.

Board of Trustees of District No. 15 Machinists' Pension Fund v. Kahle Engineering Corp., 43 F.3d 852, 860 (3d

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[6] *See also Debreceni v. George Lamoureux & Co.*, 629 F.Supp. 598, 601 (D.Mass. 1986), which appears to be the only First Circuit opinion on point and which held that notice and demand are preconditions to a suit for collection of withdrawal liability.

Cir. 1994), *citing with favor Joyce v. Clyde Sandoz*, 871 F.2d at 1120.

Similarly, the Fourth Circuit has strictly adhered to the statutory collection procedures of MPPAA, stating that:

> 29 U.S.C. § 1399(c)(2) requires that payments be commenced within sixty days after the date of demand by the plan sponsor. 29 U.S.C. § 1399(c)(5)(A) permits the plan sponsor to treat nonpayment as default if it is not cured within sixty days after it notifies the employer of its failure to pay.

Republic Industries v. Teamsters Joint Council, 718 F.2d 628, 641 n.15 (4th Cir. 1983). *Republic* recognizes that the notice and cure periods are part of the statutory scheme designed to provide due process to withdrawing employers. *Id.* *Republic* further recognizes that MPPAA itself is ambiguous about when payments become due and owing, suggesting that no payment is due until arbitration is completed. *Id.* at n.16.

Finally, the Seventh Circuit repeatedly has held that a collection claim does not accrue until notice and demand have been made. In *Robbins v. Pocket Beverage Co., Inc.*, the Seventh Circuit held that a "statutory default" authorized assessment of withdrawal liability "from the due date of the first payment." 779 F.2d 351, 353 (7th Cir. 1985). In *Central States Pension Fund v. Slotky*, Judge Posner found that, "[t]o trigger application of the statute, the pension plan must issue a notice, and a demand for payment, of withdrawal liability to the employer." 965 F.2d 1369, 1371 (7th Cir. 1992). Judge Posner further explained that MPPAA envisions an informal conciliation process to resolve any disputes over assessments before a more formal challenge through arbitration must be made. Only if the employer fails to timely initiate arbitration does "the amount of withdrawal liability assessed by the plan" become "due and owing" and only then can the plan "sue to collect it." *Id.* at 1371-72.

More recently, the Seventh Circuit reaffirmed the statutory procedures in *Central States, S.E. & S.W. Areas Pension Fund v. Bell Transit*, where it held:

> To collect withdrawal liability under the MPPAA, the plan must first 'determine the amount of withdrawal liability owed by a withdrawing employer, 29 U.S.C. §§ 1382, 1391, and send the employer a notice and demand for payment of that amount, 29 U.S.C. § 1399(b)(1)'. *Central States, Southeast and Southwest Areas Pension Fund v. Ditello*, 974 F.2d 887, 888 (7th Cir. 1992).

22 F. 3d 706, 707 (7th Cir. 1994).

The reason why the Eighth Circuit's decision is so seriously out of step with the other circuits is that the court's approach is inconsistent with both the statute and the regulations implementing it, as adopted by the Pension Benefit Guaranty Corporation ("PBGC"). The provisions of MPPAA require a multiemployer pension plan to follow certain statutory procedures *in sequential order*: to determine, to notify, to declare default and, only then, to collect.[7] Instead of following that statutory procedure, Central States created its own procedure: it determined, sued to collect, and then notified the employer.

Central States mailed its Notice and Demand on April 26, 1994. Midwest received it on April 27, 1994. The notice contained a due date of June 1, 1994, for payment of the entire withdrawal liability, and a due date of May 1, 1994, for the first monthly installment payment if Midwest chose to pay by the installment method. Central States then mailed a Past Due Notice

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[7] More specifically, the plan must: (1) determine the amount of the employer's withdrawal liability, 29 U.S.C. §§ 1382, 1391; (2) send the employer a notice and demand for payment, 29 U.S.C. § 1399(b)(1); (3) wait the statutory 60-day period to see whether the employer will pay, 29 U.S.C. § 1399(c)(2); (4) declare a statutory default and wait another 60 days to determine if the failure to pay is cured, 29 U.S.C. § 1399(c)(5)(A); and (5) sue to collect within six years. 29 U.S.C. § 1451(f)(1).

and Demand for Payment of Withdrawal Liability to Midwest on August 4, 1994. Thus, under the most favorable possible view of Central States position, its cause of action did not arise until October 3, 1994, *153 days after Midwest filed* its constitutional challenge in the District of North Dakota.[8]

In addition to the statutory sections cited above, Central States' anitcipatory Collection Action was unauthorized by the enforcement provisions of MPPAA. First, ERISA Section 4301(b) [29 U.S.C. 1451(b)] makes it clear that an action to compel payment is only appropriate if the employer has failed to make withdrawal liability payments within the time prescribed.

Second, the jurisdictional provision of the MPPAA provides, in part:

> A plan fiduciary, employer, plan participant, or beneficiary, *who is adversely affected* by the act or omission of any party under this subtitle [29 U.S.C. §§ 1381 *et seq.*] with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.

29 U.S.C. § 1451(a)(1) (emphasis added). Until an employer has failed to make a demanded payment, and failed to cure, withdrawal in itself "does not visit any adverse effect upon the plan that gives rise to [a] cause of action." *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119, 1123 (D.C.Cir. 1989). Until Central States was adversely affected by the act or omission of Midwest under this subtitle, there was no statutory basis upon

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[8] However, Central States' cause of action did not accrue on October 3, 1994, and, indeed, still has not accrued. Because Midwest timely filed for arbitration in this matter, Central States' cause of action will not accrue until the 61st day after issuance of the arbitrator's decision. *See* 29 C.F.R. § 2644.2(c)(1)(iii). Arbitration of this matter has not commenced.

which to lay jurisdiction in Central States' Collection Action. 29 U.S.C. § 1451(a). When Central States filed the Collection Action, the cause had not yet accrued. Thus, the Collection Action was premature and not ripe, and the Illinois district court lacked subject matter jurisdiction. *St. Clair v. City of Chico*, 880 F.2d 199, 201-02 (9th Cir. 1989).

By bringing suit against Midwest before the employer received any notice, Central States: (1) violated and reordered the procedures set out in 29 U.S.C. § 1382; (2) ignored the conciliation provisions of 29 U.S.C. § 1399; (3) displaced the arbitration provisions of 29 U.S.C. § 1401; and (4) violated MPPAA's enforcement provisions, 29 U.S.C. § 1451(a).

This Court should grant certiorari because the decision below is seriously flawed—it is inconsistent with the statute, PBGC regulations and the precedent of other circuits. It condones Central States' intentional violation of the law by allowing its jurisdictionally infirm and premature action to be accorded first-filed status on the basis of MPPAA jurisdiction that did not exist. The decision undermines the sense of fair play necessary for the American system of justice, because it allows blatant forum shopping by MPPAA plaintiffs.

II. THE CIRCUIT COURT'S HOLDING REGARDING THE STANDARD FOR JURISDICTIONAL ANALYSIS CONFLICTS WITH OTHER CIRCUITS AND DOES NOT REPRESENT SOUND PUBLIC POLICY

The decision below conflicts with decisions by seven other circuits regarding the appropriate scrutiny to be used during a threshold examination of subject matter jurisdiction. Midwest considers this jurisdictional flaw critical in a transfer of venue case where a race to the courthouse invokes the first-filed rule. This issue will have a profound effect in transfer situations where there might be concurrent jurisdiction in two federal courts, since the first-filed rule determines the proper venue according

to which party first establishes jurisdiction. This Court should resolve this split of authority and establish uniform nationwide application of the first-filed rule to venue transfer motions.

The first-filed rule, one of judicial construction under 28 U.S.C. § 1404(a), generally provides that when two federal district courts have concurrent jurisdiction, it is in the interest of justice to permit the court that first acquired jurisdiction to hear the case. Thus, the second action is transferred to the court where the first action is pending.

Of critical importance to invocation of the rule, however, is the assumption that both federal courts properly have jurisdiction over the causes pleaded. The rule is in actuality, a "first-to-obtain-jurisdiction" rule. Jurisdiction is, of course, always of primary importance to federal courts. Rule 12(b)(1), the vehicle by which subject-matter jurisdiction is challenged, provides, in pertinent part:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading therto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter. . .

Fed. R. Civ. P. 12(b)(1).

Rule 12(b)(1) contemplates two types of challenges to jurisdiction. The first type of challenge, a facial attack, merely questions the sufficiency of the subject matter jurisdiction alleged in the complaint. *Fed. R. Civ. P.* 8(a)(1). The second type of challenge, a factual attack, asserts that the federal court actually lacks jurisdiction over the subject matter of this case, regardless of the sufficiency of the allegations in the complaint. *KVOS, Inc. v. Associated Press*, 299 U.S. 269 (1936). *See* generally 5A Wright & Miller, *Federal Practice and*

Procedure: Civil 2d § 1350 at 211-13 (2d Ed. 1990 and 1995 Supp.).

When deciding a factual attack under Rule 12(b)(1), several circuits have held that federal courts should look beyond the jurisdictional allegations in the complaint, even if this requires receiving evidence, and resolve any disputed jurisdictional facts to determine whether in fact subject matter jurisdiction exists. *See, e.g., Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995); *Moran v. Saudi Arabia*, 27 F.3d 169, 172 (5th Cir. 1994); *Ohio National Life Ins. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990); *Rennie v. Garrett*, 896 F.2d 1057, 1057-58 (7th Cir. 1990); *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988); *Mortenson v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 890-92 (3d Cir. 1977); and *Exchange Nat'l Bank of Chicago v. Touche Ross & Co.*, 544 F.2d 1126, 1131 (2d Cir. 1976).[9] In Central States' Collection Action, however, the presentation and receipt of evidence would not have been necessary, because the factual allegations contained in the complaint, and the provisions of MPPAA, were sufficient to allow the court to determine that jurisdiction did not exist.

The circuit court's decision, however, conflicts with this long line of decisions because it accepted jurisdiction based on nothing more than Central States' jurisdictional allegation in the complaint filed in the Collection Action. When facts presented to the court give rise to a factual challenge to the basis of jurisdiction, the court *must* weigh the conflicting evidence to determine whether jurisdiction exists or not.[10] *Ohio National Life Ins. Co.*,

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[9] Other decisions by the Second and Third Circuits are not inconsistent with the Eighth Circuit's decision. *See Goldman v. Gallant Sec., Inc.*, 878 F.2d 71 (2nd Cir. 1989); *Kulick v. Pocono Downs Racing Ass'n, Inc.*, 816 F.2d 895 (3rd Cir. 1987); and *Growth Horizons, Inc. v. Delaware County*, 983 F.2d 1277 (3rd Cir. 1993).

[10] It appears that the decision below is also in conflict with earlier Eighth Circuit decisions that seem to require an examination of

922 F.2d at 325. In addition the court has wide discretion to allow affidavits, documents or other evidence in an evidentiary hearing to resolve the disputed jurisdictional facts. *Id.* The subject matter jurisdiction of the federal courts presents a question of law, which is reviewable *de novo*. *McCarthy*, 850 F.2d at 560.[11]

Judicial economy demands that the issue of jurisdiction be decided early. For this reason and because federal courts are courts of limited jurisdiction, federal courts generally treat the question of jurisdiction as the primary initial question in a case. The Third Circuit expressed the standard succinctly:

> Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction—its very power to hear the case—there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.

Mortenson, 549 F.2d at 891.

Consistent with the majority rule and the law in the Eighth Circuit prior to the decision under review, Midwest asked the court to determine, as a threshold matter,

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jurisdictional claims in parallel cases under the first-filed rule, even if it entails a review of evidence beyond the facts alleged in the complaint. *Northwest Airlines, Inc. v. American Airlines, Inc.*, 989 F.2d 1002, 1006 (8th Cir. 1993). *Osborn v. United States*, 918 F.2d 724, 729-30 (8th Cir. 1990). *Boatmen's First National Bank of Kansas City v. Kansas Public Employees Retirement System*, 57 F.3d 638 (8th Cir. 1995) (the district court must consider the factual circumstances in each case before applying [the first-filed] rule). 57 F.3d at 641. Certainly, future litigants will be confused about this apparent conflict.

[11] Where no factual dispute exists, the appellant court may also evaluate the merits of jurisdictional claims *de novo*. *Mortenson*, 549 F.2d at 891.

whether Central States filed suit in Illinois before it complied with the statutory prerequisites from which federal jurisdiction arises. The court could have determined from the face of Central States' complaint, and the provisions of MPPAA, that the pension fund failed to comply with the statutory prerequisites to a collection action. *See* Argument I, *supra*. However, the court below refused to make a threshold determination to resolve Midwest's factual attack on the jurisdiction of the Collection Action.

This Court should grant certiorari in order to address the problem, increasingly common in MPPAA cases, of uninhibited forum shopping based on nothing more than conclusory pleadings. This case represents a grave departure from the accepted and usual course of determining jurisdictional issues.

III. FURTHER ATTRIBUTES OF THIS CASE FAVOR GRANTING CERTIORARI.

For several reasons, the procedural posture of this case makes it ideal for this Court's review. First, the questions presented are devoid of any factual dispute. For example, it is undisputed that Central States filed its action before it had served notice on Midwest of its assessed liability, and before payment was due. Second, the judgment below turns entirely on the legal standard employed by the Eighth Circuit.

IV. PRACTICAL CONSEQUENCES FAVOR GRANTING CERTIORARI.

This Court's review is also warranted because the existing split in the circuits has disruptive economic and jurisprudential ramifications and will encourage forum shopping. Under the rule adopted by the Eighth Circuit, the jurisdiction of the transferee court is not made until after a Section 1404 transfer has been completed. By that time, the parties will already have expended significant time and resources on the transfer issue, and will be

forced to duplicate those efforts in the transferee court. If jurisdiction is found wanting by the transferee court, valuable time and judicial resources will have been wasted.

The problem is particularly acute for pension funds and employers who do not have the financial wherewithal to pay for duplicative litigation that inevitably results from the transfer of an action to a court that lacks subject-matter jurisdiction. Even if the impact of the decision below were limited to the thousands of employers headquartered in cities like St. Louis, Kansas City, Minneapolis-St. Paul, Little Rock, Omaha, and Des Moines (all within the Eighth Circuit), the case would still have sufficient importance to merit this Court's review. Unless this Court establishes uniformity, valuable time, money and court resources will continue to be wasted.

The decision below will expose defendants to the burden and expense of proceedings in a second forum, when a transfer may have been denied upon a proper examination of jurisdiction in both the transferor and transferee courts. Had this instant case been brought against Midwest in the Second, Third, Fourth, Fifth, Sixth, Seventh or Ninth circuits, for example, the complaint would have been dismissed. Such disparity in results makes the uniform administration of federal law among the circuits impossible.

CONCLUSION

The petition for writ of certiorari should be granted to establish when a cause of action accrues under MPPAA and to establish a uniform methodology for application of the first-filed rule in transfer motions.

Respectfully submitted,

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March 7, 1996

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 94-3328

MIDWEST MOTOR EXPRESS, INC.; MIDNITE EXPRESS, INC.; EXPRESS CARTAGE, INC.,
Appellants,

v.

CENTRAL STATES SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,
Appellee.

Appeal from the United States District Court for the District of North Dakota

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Submitted: September 14, 1995

Filed: December 4, 1995

Before WOLLMAN, JOHN R. GIBSON, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

Midwest Motor Express appeals from an order transferring this case from the District of North Dakota to the

Northern District of Illinois. We affirm the order of the district court.[1]

I.

Midwest was obligated under its multiemployer collective bargaining agreement to make contributions to Central States, a pension fund. During a labor strike, Midwest ceased making pension contributions to Central States, creating concern at Central States that Midwest would withdraw and permanently cease making such contributions. If an employer withdraws from a multiemployer plan, the employer is liable to the plan for an amount known as "withdrawal liability." 29 U.S.C. § 1381(a) (1985). The parties litigated the matter of withdrawal liability, but settled the litigation before it reached any conclusion on its merits.

Some time later, the union at Midwest was decertified. This triggered Central States' belief once again that Midwest would withdraw and cease to make contributions. Central States sued Midwest in the Northern District of Illinois and sent Midwest a Notice and Demand of Withdrawal Liability as provided under the Multiemployer Pension Plan Amendments Act of 1980. In response to this notice, Midwest initiated the present action for declaratory and injunctive relief and moved to enjoin Central States from seeking remedies based on Midwest's failure to pay withdrawal liability. (It seems that the proposed injunction was an attempt to prevent Central States from moving ahead in any other forum.) Central States then moved to transfer venue to the Northern District of Illinois under 28 U.S.C. § 1404(a). A magistrate judge [2] granted the motion to transfer and dismissed the motion for injunction and the district court upheld the magistrate's de-

[1] The Honorable Patrick A. Conmy, United States District Judge for the District of North Dakota.

[2] The Honorable Dwight C.H. Kautzmann, United States Magistrate Judge for the District of North Dakota.

cision. The district court clerk's office, without waiting a reasonable period of time to give the parties an opportunity to file a notice of appeal, immediately mailed the case file to the Northern District of Illinois. The Northern District of Illinois dismissed the case after transfer on the grounds that it had no jurisdiction while this appeal was lodged in the Eighth Circuit.

II.

We initially address some jurisdictional matters. First, although we generally do not exercise jurisdiction over transfer orders, *see, e.g., United States Fire Ins. Co. v. American Family Life Assurance Co.*, 787 F.2d 438, 439 (8th Cir. 1986), we do so when the order to transfer has the effect of refusing an injunction and the motion for injunction and the order to transfer are inextricably bound up with each other. *See* 28 U.S.C. § 1292(a)(1); *Nordin v. Nutra/System, Inc.*, 897 F.2d 339, 343 (8th Cir. 1990); *Emerson Elec. Co. v. Black & Decker Mfg. Co.*, 606 F.2d 234, 237 (8th Cir. 1979). In this case, the order had the effect of refusing an injunction, and the order and the injunction sought were inextricably bound up with each other, because the injunction would have prevented Central States from proceeding in the Northern District of Illinois, and the order in fact sent the case to that district.

Second, Central States argues that this court does not have jurisdiction because the district court clerk mailed the court file to the Northern District of Illinois before the notice of appeal was filed in our court. Our circuit takes the view that the physical receipt of the file in the transferee court is the event that signals the end of jurisdiction in the transferor court. *In re Nine Mile Limited*, 673 F.2d 242, 243-244 & n. 5 (8th Cir. 1982) (per curiam). Central States argues that, under *Nine Mile*, we never acquired jurisdiction because the notice of appeal was filed after the district court lost jurisdiction of the

case. We note, however, that the physical transfer of the file was premature because it was sent in violation of *Nine Mile*'s directive to district court clerks that they wait a reasonable period before transferring case files after a transfer order is entered, 673 F.2d at 244, and also appears to have been an inadvertence since the file was mailed in violation of that clerk's office's own policy (presumably in accordance with *Nine Mile's directive*) of waiting thirty days before mailing a file pursuant to a transfer.

We question the applicability of *Nine Mile* when the clerk's physical transfer of the file was premature, mistaken, and was of no practical effect. The premature mailing in violation of *Nine Mile*'s directive renders the transfer of questionable legal effect. *Cf. Farrell v. Wyatt*, 408 F.2d 662, 664 (2d Cir. 1969) ("the question here is whether the district court had power to order the transfer; when that is the issue, we reject the argument . . . that the clerk's physical transfer of the file destroyed our jurisdiction"). The mailing also appears to have been a simple mistake, and, frankly, it seems to us odd at best that the clerk's act of mistakenly putting a case file on a mail truck bound for Montana could divest a federal circuit court of appeals of jurisdiction. The rule that jurisdiction follows the file avoids the procedural and jurisdictional snarl that would likely ensue if two courts were simultaneously working on the same case. *See* 15 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3846 at 358 (2d ed. 1986) (exceptions to the rule in question "create possibilities of unseemly duplication of effort, and perhaps even inter-circuit conflict, if an appeal is going forward in one circuit while the papers are lodged in a district court in another"). We need not worry about any such conflict here because the Northern District of Illinois declined jurisdiction over the transferred file.

The premature physical transfer of the file in this case was a violation of our directive in *Nine Mile*; the Illinois

court recognized the mistake and declined jurisdiction. These two facts separate our case from *Nine Mile*. To find under these circumstances that we do not have jurisdiction because the file was accidentally mailed to Illinois would elevate form over substance and serve only to delay the resolution of this appeal. We conclude that we have acquired jurisdiction.

III.

We affirm the district court and its decision to transfer this case based upon the "first-filed" rule. This rule "gives priority, for purposes of choosing among possible venues when parallel litigation has been instituted in separate courts, to the party who first establishes jurisdiction." *Northwest Airlines, Inc. v. American Airlines, Inc.*, 989 F.2d 1002, 1006 (8th Cir. 1993). Midwest maintains that Central States' claims were premature when filed and thus legally nonexistent, and that, as a result, the Illinois forum was not the first to acquire jurisdiction. Midwest thus asks this court to weigh the merits of the Illinois action in order to determine whether that forum has jurisdiction. But this is a non sequitur. "A court may have jurisdiction over a case even though the case is one to which there is no merit. . . . The jurisdiction of the federal courts is dependent on the subject matter of the action or the status of the parties to it; it is not dependent on the merits of the case." Charles A. Wright, *Law of Federal Courts* 31 (5th ed. 1994) (footnote omitted); *see, e.g., Venner v. Great Northern Ry. Co.*, 209 U.S. 24, 33-35 (1908). The Illinois court therefore has jurisdiction to decide the issues before it and it obtained this jurisdiction before the North Dakota court did.

Midwest also argues that "compelling circumstances" should lead us to ignore the first-filed rule, *see United States Fire Ins. Co. v. Goodyear Tire & Rubber Co.*, 920 F.2d 487, 488-89 (8th Cir. 1990), but we find the proffered circumstances insufficiently compelling. Midwest again asserts that Central States' claims were pre-

mature when filed, but, if the claims are legally infirm, we trust the Illinois court to dismiss them. Midwest also alleges that Central States' complaint contained false statements of fact, and that this constitutes a compelling circumstance for ignoring the first-filed rule. If these alleged misstatements indeed exist, Midwest may move for sanctions in the Illinois court. We might have been be more favorably inclined to Midwest if it had produced evidence that Central States promised or indicated in some manner that it would not sue, that Midwest relied on this representation, and that Central States then filed a surprise complaint, *see id.* at 489, but Midwest has made no such showing and offers to make none.

Finally, the district judge suggested at the end of his opinion that he was "reasonably certain" that Illinois courts had greater expertise in pension benefit matters. Midwest argues that this comment demonstrates that the district court made its decision on improper grounds. The order, however, recited legally sufficient grounds for transfer. The comment has the quality of a mere observation or afterthought, and does not suggest to us that the district court abused its discretion in making its decision to transfer.

IV.

There remains an outstanding matter of contempt sanctions. Central States filed a motion for a preliminary injunction in the Illinois action seeking to prevent Midwest from transferring assets and to compel Midwest to pay all past-due amounts under the withdrawal liability payment schedule as well as to make future payments under that schedule. Midwest responded by applying to the Eighth Circuit for an injunction pending appeal preventing Central States from "enforcing, collecting, accepting, claiming or directly or in escrow, obtaining interim payments of alleged pension withdrawal liability from Midwest in any other forum." We granted Midwest's motion for an injunction pending appeal. Central States then modified its motion for injunction in the Illiois action

by dropping the request that Midwest pay withdrawal liability, but pushed ahead with its attempt to forbid Midwest from transferring assets. The Illinois court denied the motion and Central States sought review in the Seventh Circuit. Upon Midwest's motion, we found Central States in contempt.

We have reconsidered the order finding Central States in contempt. Our order did not specifically enjoin Central States from seeking to prevent Midwest from transferring assets. *See Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (per curiam) (injunction must contain explicit notice of precisely what conduct is outlawed). We are of the view that Central States did not violate our injunction and therefore reverse our finding of contempt against Central States.

V.

For the foregoing reasons, we affirm. Midwest's motion for leave to supplement the record is granted. All other pending motions are denied.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

A1-94-044

MIDWEST MOTOR EXPRESS, INC., NME, INC.,
MIDNITE EXPRESS, INC., and EXPRESS CARTAGE, INC.,
Plaintiffs,

v.

CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND,
Defendant.

MEMORANDUM AND ORDER

Plaintiffs, "Midwest", appeal Magistrate Judge Kautzmann's order transferring venue of this case to the Northern District of Illinois. Midwest appeals this order under U.S. District Court Local Rule 28.[1]

The issue before the court is whether the Magistrate Judge abused his discretion in granting Defendant Central States Pension Fund's "Central States" motion to transfer this case to Illinois.

Plaintiffs' describe their case as a constitutional challenge to the Mulitemployer Pension Plan Amendments

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[1] Presumably this appeal is brought under 28(G)(4)(a) of the Local Rule which says "[any party may appeal from a magistrate's determination of a non-dispositive matter within 10 days after being served with a copy of the magistrate's order. . ."

Act of 1980 "MPPAA" and they express their intention to "appeal, if necessary, to the Supreme Court." In North Dakota, this constitutional challenge takes the form of a declaratory action and request for an injunction.

Defendant Central States says that Midwest withdrew from the Central States Pension Fund in 1991 owing a withdrawal sum under the MPPAA and they describe their law suit as a "collection action."

Central States filed its collection action in the Eastern Division, Northern District of Illinois on April 26, 1994. Midwest filed is action seeking declaratory and injunctive relief in the Southwestern Division of the District of North Dakota on May 4, 1994.

Midwest advances several arguments as to why they believe the Magistrate's transfer was clearly erroneous and should be reversed. Midwest says the Illinois action is not really the "first filed" action because they have filed a motion to dismiss which has yet to be ruled upon and they might win. They say the Central States Illinois action was premature, a false pleading and is reflective of bad conduct which should not be countenanced. Midwest also says the North Dakota action is "further along" than is the Illinois action.

Central States counters by saying the two actions are the same and Midwest's defense on the merits in the Illinois action will raise their constitutional issues. It says the North Dakota action is not "farther along".[2] Central States also says the Illinois action was validly filed and Midwest simply lost their attempt to be the first in the court house.

The court has reviewed the pleadings which were available to the Magistrate Judge at the time of the order to transfer as well as Midwest's Brief In Support of Appeal

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[2] Each party has filed a competing motion to dismiss the action they do not perceive to be in their preferred forum and neither party has filed an answer.

of Magistrate's Memorandum and Order and Central States' Responsive Brief and is not convinced that the Magistrate Judge abused his discretion in transferring the case to Illinois.

At this stage the Illinois action is the "first filed" action. The North Dakota case is not meaningfully "further along" and the two cases involve the same issues. Moreover, the Court is reasonably certain that the Illinois court is more familiar with the "angles" and "ins and outs" of Employee Pension Fund Law.

The court declines to replace Magistrate Judge Kautzmann's concern that two courts could retain jurisdiction over the same set of facts and reach dissimilar results with Midwest's speculation that the Illinois court may grant their motion to dismiss, leaving the dispute in limbo.

Accordingly and for the reasons cited above, Midwest's appeal of Magistrate Judge Kautzmann's order of July 27, 1994 (docket #300 is denied.

SO ORDERED.

Dated this 30th day of August, 1994.

/s/ Patrick A. Conmy
PATRICK A. CONMY
District Judge
United States District Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Case No. A1-94-44

MIDWEST MOTOR EXPRESS, INC.,
Plaintiff,

v.

CENTRAL STATES SOUTHEAST AND
SOUTHWEST AREAS PENSIONS FUND,
Defendant.

MEMORANDUM AND ORDER

Before the court are various motions including the defendant's motion to dismiss or change venue to the district of Illinois. For reasons stated in this opinion, the court will address that motion, and dismiss all pending motions without prejudice to allow them to be renewed in the district of Illinois.

BACKGROUND

On April 26, 1994, Central States Southeast and Southwest Areas Pensions Fund (Central States) filed an action against Midwest in the Northern District of Illinois, seeking the collection of withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) and declaratory and injunctive relief. On that same day, Central States mailed Midwest a notice and demand for payment of withdrawal liability.

On May 4, 1994, Midwest Motor Express (Midwest) filed the present action in the district of North Dakota,

requesting the court to declare the assessment of withdrawal liability on Midwest unconstitutional and void. Midwest filed an amended complaint on May 17, 1994. Midwest's complaint contained the same allegations as those contained in its defense of the Illinois lawsuit. However, in the North Dakota case, Midwest alleged constitutional and statutory defenses not raised in the Illinois lawsuit.

On May 20, 1994, in the Illinois action, Midwest filed a motion to dismiss the case, or in the alternative, transfer the case to North Dakota. No decision has been rendered on that motion by the Illinois court.

On June 1, 1994, Central States filed a motion to extend time to file the answer due June 2, 1994 in the North Dakota case. On June 10, 1994, Midwest filed a motion for default. On June 22, 1994, Central States filed a motion to dismiss or to transfer venue. On July 12, 1994, Midwest filed a motion for a temporary restraining order and motion for a preliminary injunction and also a motion for leave to file a second amended complaint. On July 26, 1994, Central States filed its response to the motion for temporary restraining order and preliminary injunction.

DISCUSSION

In its motion to transfer, Central States requests the court transfer this case to the district of Illinois according to the first filed rule. Midwest opposes the transfer, arguing that compelling circumstances demand that the second-filed North Dakota case take precedence over the first-filed Illinois case.

Generally, the first-filed rule states that in cases of concurrent jurisdiction, the district first obtaining jurisdiction over the parties should proceed to adjudicate the controversy. *Northwest Airlines, Inc. v. American Airlines, Inc.*, 989 F.2d 1002, 1004 (8th Cir. 1993). It

is not intended to be a rigid rule, but to be applied to best serve the interests of justice. *Id.* In the absence of compelling circumstances, the first-filed rule should apply. *Id.*

Midwest claims that because the events surrounding the withdrawal took place in North Dakota and the fact that the witnesses are located in North Dakota constitute compelling circumstances. The fact that most of the witnesses and the activities took place in North Dakota weighs in Midwest's favor. However, it also appears that the case consists of issues of law, and that no evidentiary hearings will be required. If any hearings are required, any inconvenience to the parties or witnesses does not rise to "compelling circumstances."

Midwest next argues that the case would be more swiftly resolved in this district as opposed to the Illinois courts which have a more crowded docket. Although that may be the case, a less crowded docket is not a factor which compels this court to abrogate the "first-filed" rule and go forward in a case which is already before another federal district court.

Midwest argues that the first filed action is a false pleading, seeking payment of withdrawal liability allegedly owed and past due at the time suit was filed, before notice and demand for payment had even been served on Midwest. Midwest further argues that Central States filed an anticipatory premature collection action and therefore, the action should not be deemed first filed.

In those cases that granted the second filed case to take precedence over the first filed case, the compelling circumstances often involved one party misleading another into thinking that no lawsuit would be filed. See *Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599 (5th Cir. 1983). Courts also look more closely at actions for declaratory or injunctive relief than those for

damages. See *Northwest* at 1007. (Declaratory judgment actions "may be more indicative of a preemptive strike than a suit for damages" and merit a closer look.) Other cases involve a second-filed case proceeding farther along than the first-filed and was therefore more proper. *Orthmann v. Apple River Campground*, 765 F.2d 119, 121 (8th Cir. 1985). That is not the case here. It appears that it is possible that Midwest did not know of the Illinois lawsuit before it filed the lawsuit in North Dakota. However, the fact remains that the Illinois lawsuit was filed first, and there is no evidence before the court that Midwest was misled into thinking that Central States would not file a lawsuit.

If this court would continue with this lawsuit while the Illinois court is proceeding with the first-filed case, it would be possible that the two federal courts would issue opposite opinions on the same issue with the same parties. "This totally unnecessary and potentially confusing duplication of judicial effort is precisely what the first-filed rule is calculated to avoid." *Northwest* at 1006.

Central States filed the action first, and the Illinois district court is as able as this one to determine all issues surrounding the controversy, including the appropriateness of filing the complaint before the withdrawal liability was overdue, and the constitutionality of the assessment of liability.

The court finds that there are not compelling circumstances present which require the second-filed case to take precedence over the first action. There appears no "misleading, egregious actions" to compel this court to go forward with the present lawsuit while the Illinois suit is still proceeding.

Based on the foregoing, Central States' motion to transfer venue pursuant to 28 U.S.C. § 1404 is HEREBY GRANTED. (doc. #17). The clerk is directed to forward this file to the eastern division of the northern dis-

trict of Illinois. All other pending motions are HEREBY DENIED, without prejudice. The parties may renew the motions as they deem appropriate in the northern district of Illinois.

Dated this 27th day of July, 1994.

/s/ Dwight C.H. Kautzmann
DWIGHT C.H. KAUTZMANN
United States Magistrate

Case No. A1-94-44

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-3328NDBI

MIDWEST MOTOR EXPRESS, INC., *et al.*,
Appellants,

vs.

CENTRAL STATES SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND,
Appellee.

Order Denying Petition for Rehearing
and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

January 22, 1996

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk
U.S. Court of Appeals, Eighth Circuit

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-3328NDBI

MIDWEST MOTOR EXPRESS, INC., *et al.*,
Appellants,

vs.

CENTRAL STATES SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND,
Appellee.

Appeal from the United States District Court
for the District of North Dakota

Appellants' motion to stay the mandate of this court is granted pending the filing of a petition for writ of certiorari with the United States Supreme Court.

The issuance of the mandate in this case shall be stayed to and including 3/11/96. If within that time there is filed with the Clerk of this court a certificate of notification by the Clerk of the Supreme Court that a petition for writ of certiorari has been filed, this stay shall continue until final disposition of the case by that court.

February 8, 1996

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk
U.S. Court of Appeals, Eighth Circuit

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

94C 2561

CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND,
a pension trust, and HOWARD MCDOUGALL, trustee,
Plaintiffs,

v.

MIDWEST MOTOR EXPRESS, INC.,
a North Dakota corporation,
Defendant.

JURISDICTION AND VENUE

1. This is an action for collection of withdrawal liability, interest, and penalties incurred by an employer as a result of a withdrawal from a multiemployer pension plan.

2. This action arises under the Employee Retirement Income Security Act of 1974 ("ERISA") *as amended* by the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. § 1001 *et seq.* (1982). This Court has jurisdiction over this action under sections 502(e), 502(f), and 4301(c) of ERISA, 29 U.S.C. §§ 1132(e), 1132(f) and 1451(c).

3. Venue lies in this Court under sections 502(e)(2) and 4301(d) of ERISA, 29 U.S.C. §§ 1132(e)(2) and 1451(d), because the Pension Fund is administered at its principal place of business in Rosemont, Illinois.

PARTIES

4. Plaintiff Pension Fund is multiemployer pension plan within the meaning of sections 3(37) and 4001 (a)(3) of ERISA, 29 U.S.C. §§ 1002(37) and 1301 (a)(3). Plaintiff Howard McDougall is one of the present trustees of the Pension Fund and is a plan fiduciary of the Pension Fund within the meaning of section 4301 (a)(1) of ERISA, 29 U.S.C. § 1451(a)(1). The trustees administer the Pension Fund at 9377 West Higgins Road, Rosemont, Illinois 60018.

5. Pursuant to sections 502(a)(3) and 4301(a)(1) of ERISA, 29 U.S.C. §§ 1132(a)(3) and 1451(a)(1), a plan fiduciary is authorized to bring this action on behalf of the Pension Fund, its participants, and beneficiaries for the purpose of collecting withdrawal liability.

6. Defendant Midwest Motor Express, Inc. ("Midwest") is a North Dakota corporation with its principal place of business located in the State of North Dakota.

COUNT I:

COLLECTION OF WITHDRAWAL LIABILITY

7. Midwest was subject to collective bargaining agreements between itself and various Teamster Local Unions under which Midwest was required to make contributions to the Pension Fund on behalf of certain of its employees.

8. The Pension Fund has determined that on or about August 17, 1991, Midwest permanently ceased its obligation to contribute to the Pension Fund thereby effecting a "complete withdrawal" as defined in section 4203 of ERISA, 29 U.S.C. § 1383.

9. The Pension Fund has determined that Midwest incurred withdrawal liability to the Pension Fund in the amount of $2,546,439.30 as determined under section 4201(b) of ERISA, 29 U.S.C. § 1381(b).

10. By letter dated April 26, 1994, the Pension Fund issued to Midwest a notice and demand for payment of

withdrawal liability in accordance with sections 4202(2) and 4219(b)(1) of ERISA, 29 U.S.C. §§ 1382 and 1399(b)(1). The notice and attached invoice notified Midwest that it was required to discharge its liability in monthly payments of $92,576.65.

11. Midwest has made no withdrawal liability payments to the Pension Fund.

COUNT II:

DECLARATORY AND INJUNCTIVE RELIEF

12. The Pension Fund realleges paragraphs 1 through 10 of the complaint.

13. On or about January 12, 1994, the employees of Midwest voted to decertify their union bargaining unit. The decertification was confirmed by the National Labor Relations Board on April 1, 1994.

14. Following the decertification Midwest was no longer obligated to contribute to the Pension Fund on behalf of its employees under any collective bargaining agreement or duty under applicable labor-management relations law, within the meaning of Section 4212(a) of ERISA, 29 U.S.C. § 1392(a).

15. Following the decertification no labor dispute exists between Midwest and its employees, within the meaning of Section 4218(2) of ERISA, 29 U.S.C. § 1398(2).

WHEREFORE, plaintiffs request the following relief:

(a) A judgment on Count I against defendant Midwest, and on behalf of the plaintiffs, pursuant to section 502(g)(2) of ERISA, 29 U.S.C. § 1132 (g)(2), for—

(1) past due payments of withdrawal liability;

(2) interest at the prime rate per annum on the unpaid withdrawal liability;

(3) an amount equal to the qreater of interest on the unpaid withdrawal liability or liquidated damages of 20% of the unpaid withdrawal liability;

(4) attorney's fees and costs;

(b) An order compelling defendant Midwest to make its future withdrawal liability payments in the amount of $92,576.65 per month in accordance with the payment schedule determined by the Pension Fund;

(c) A declaration under Count 2 that—

(1) defendant Midwest has ceased to have an obligation to contribute to plaintiff Pension Fund within the meaning of sections 4203(a)(1) and 4212(a) of ERISA, 29 U.S.C. §§ 1383(a)(1) and 1392(a);

(2) no labor dispute exists between defendant Midwest and its employees within the meaning of section 4218(2) of ERISA, 29 U.S.C. § 1398(2);

(d) As alternative relief under Count 2—

(1) an order compelling defendant Midwest to initiate arbitration in accordance with section 4221 of ERISA, 29 U.S.C. § 1401, and the rules of the Pension Fund in the event that defendant Midwest wishes to dispute Pension Fund's withdrawal liability assessment;

(2) an injunction against defendant Midwest prohibiting it from initiating any other action or proceeding to dispute the Pension Fund's withdrawal liability assessment.

(e) That this Court retain jurisdiction of this cause pending compliance with its orders; and

(f) For such further or different relief as this Court may deem proper and just.

Respectfully submitted,

/s/ Terence G. Craig
TERENCE G. CRAIG
Attorney for Plaintiffs
Central States, Southeast and
Southwest Areas Pension Fund
9377 West Higgins Road
Des Plaines, Illinois 60017-5123
(708) 518-9800, Ext. 3443

April 26, 1994

APPENDIX G

[Logo]

CENTRAL STATES
SOUTHEAST AND
SOUTHWEST AREAS
PENSION FUND

April 26, 1994 VIA CERTIFIED MAIL
RETURN RECEIPT # P 840 228 594
AND EXPRESS MAIL

Midwest Motor Express, Inc.
5015 Main Avenue, East
Bismarck, ND 58501

RE: NOTICE AND DEMAND FOR PAYMENT OF
WITHDRAWAL LIABILITY MME, INC.
MIDWEST MOTOR EXPRESS, INC.
ASSESSMENT NO.: 4913053-WL940139-01

Gentlemen:

This is a demand for payment of withdrawal liability incurred as a result of a permanent cessation of contributions to Central States, Southeast and Southwest Areas Pension Fund (the "Fund") by the above captioned business on behalf of some, or all, of its bargaining unit employees. This demand is made pursuant to Section 4219 of the Employee Retirement Income Security Act of 1974, as amended (29 U.S.C. 1399(b)), and applies equally to all members of any controlled group of trades or businesses, as defined in Section 414(c) of the Internal Revenue Code, of which the above captioned business is a member.

The total amount of such withdrawal liability is $2,546,439.30.

Please make your check payable to Central States, Southeast and Southwest Areas Pension Fund and forward it to the address as follows:

CENTRAL STATES WITHDRAWAL LIABILITY
P. O. Box 71262
Chicago, Illinois 60694

Please write the assessment number on your check.

At your option, the withdrawal liability may be amortized and paid in monthly installments according to the enclosed minimum required payment schedule, or such liability may be paid in a lump sum. No penalty, interest or amortization charges will be applied if payment of the entire withdrawal liability is received by this office on or before June 1, 1994. If you choose the monthly installment option, amortization charges will accrue on the outstanding balance at the annual rates indicated on the enclosed minimum required payment schedule.

Subject to applicable regulations, if any payment of withdrawal liability is not made when due and such payment plus delinquency charges is not made within sixty (60) days after receiving written notice from the Fund of such delinquency, the Fund may require immediate payment of the remaining balance of the withdrawal liability plus delinquency charges accrued from the due date of the first payment which was not timely made.

Enclosed herewith are documents as follows:

1. A copy of the withdrawal liability calculation;
2. A copy of the minimum required payment schedule for the monthly installment option;
3. A copy of the Fund's procedure governing review of any items relating to the determination and calculation of withdrawal liability, the minimum required payment schedule, and the resolution of disputes regarding withdrawal liability.

Sincerely,

/s/ Harry E. Keil
HARRY E. KEIL
Manager, Delinquent Accounts

HEK:SMT:cc-mm
Enclosures

cc: Withdrawal File

PLEASE NOTE: For inquiries relating to the calculation of this assessment contact Gina Alvarez on extension 3097.

For all other inquiries contact Susan M. Tebbens on extension 3608.

[Enclosures Omitted in Printing]

(2)

No. 95-1431

Supreme Court, U.S.
FILED
APR 5 1996
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

MIDWEST MOTOR EXPRESS, INC., *et al.*,
Petitioners,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF IN OPPOSITION OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND

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10 pp

QUESTIONS PRESENTED

Central States Pension Fund assessed Midwest Motor Express for withdrawal liability under 29 U.S.C. § 1381 and sued Midwest in the Northern District of Illinois on April 26, 1994, to collect this liability. On May 4, 1994, Midwest sued Central States in the District of North Dakota seeking to have the withdrawal liability statute declared unconstitutional. Midwest's case was ordered transferred to the Northern District of Illinois where Central States' first-filed action was pending. Midwest argues, however, that the Northern District of Illinois lacks jurisdiction over Central States' case, and, therefore, this first-filed case provides no basis for a transfer of Midwest's second-filed case. For its own obscure reasons Midwest has sought to have this jurisdictional question regarding the Illinois case resolved in the District of North Dakota, the Eighth Circuit, and now this Court, but not in the Northern District of Illinois where the case resides. The court below ruled that Central States' complaint in the Northern District of Illinois invoked the jurisdiction of that court and that the district court below did not abuse its discretion in transferring Midwest's case to the Northern District of Illinois. The questions presented are—

1. Should the court below have ruled on a factual challenge to the jurisdictional sufficiency of a case not before it and pending in a district court in another circuit?

2. Does a district court's subject matter jurisdiction of an action to collect withdrawal liability depend on the timing of the complaint?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1431

MIDWEST MOTOR EXPRESS, INC., *et al.*,
Petitioners,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF IN OPPOSITION OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND

STATEMENT OF THE CASE

Respondent Central States, Southeast and Southwest Areas Pension Fund ("Central States") is a multiemployer pension plan within the meaning of Section 4001(a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1301(a)(3). In 1980 Congress amended ERISA with the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). In MPPAA Congress provided that employers who contribute to multiemployer plans are liable for withdrawal liability if they cease to have an obligation to contribute

(withdraw). *See Concrete Pipe and Products v. Construction Laborers Pension Trust*, —— U.S. ——, 113 S.Ct. 2264 (1993).

Petitioners Midwest Motor Express, Inc., *et al.* (collectively "Midwest") are a group of trades or businesses under common control within the meaning of 29 U.S.C. § 1301(b)(1) and thus constitute a single employer for purposes of ERISA's withdrawal liability provisions. Until August, 1991, Midwest Motor Express contributed to Central States' pension plan on behalf of certain of its employees. Due to a labor dispute those contributions ceased, and in April, 1994, the union was decertified. Since the cessation of contributions was permanent, Central States assessed Midwest for withdrawal liability of $2,546,439.30 payable in monthly installments of $92,576.65 pursuant to 29 U.S.C. §§ 1382 and 1399 (c)(2).

On April 26, 1994, Central States filed a complaint in the United States District Court for the Northern District of Illinois to collect the monthly payments of withdrawal liability from Midwest and for declaratory and injunctive relief. On the same day (April 26) Central States sent a letter to Midwest (received by Midwest on April 27) demanding that payments be made on the first day of each month commencing May 1, 1994. The complaint was served on Midwest on May 9, 1994. On May 4, 1994, Midwest filed a complaint in the United States District Court for the District of North Dakota seeking to have the withdrawal liability statute declared unconstitutional as applied to it and enjoin Central States from collecting withdrawal liability.[1]

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[1] Central States will hereinafter refer to the Northern District of Illinois and its case as the "Illinois court" and "Illinois case," and to the District of North Dakota and its case as the "North Dakota court" and "North Dakota case."

Central States moved to transfer venue of Midwest's North Dakota case to Illinois on the basis that Central States had filed first in Illinois. The magistrate judge granted Central States' motion on July 27, 1994. The district judge affirmed the magistrate judge on August 30, 1994. The court below affirmed the district judge on September 14, 1995.

The Illinois case did not progress. It was for many months stayed due to an injunction of the Eighth Circuit against Central States from collecting withdrawal liability. By order dated March 25, 1996, however, the Eighth Circuit has left the fate of that injunction in the hands of the Northern District of Illinois, which, Central States presumes, may now proceed with its case.[2] In addition Midwest has filed an arbitration, as it was required to do by 29 U.S.C. § 1401. The arbitration has also been stayed. Following the decision of the court below Central States sought to reactivate both the Illinois case and the arbitration. Midwest has resisted both on the grounds that this Petition is pending. Decisions are pending by arbitrator and district court. Denial of this Petition would moot the question of a stay, and those cases would proceed immediately to the merits.[3]

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[2] The Illinois court asked the parties to seek clarification from the Eighth Circuit on the viability of its injunction. In an order issued March 25, 1996, the Eighth Circuit denied the motions for clarification, stating that the status of the injunction "is a question of law for the United States District Court for the Northern District of Illinois to decide." This order is reproduced in the Appendix hereto. Accordingly there is now no impediment to the Illinois court's proceeding as it sees fit—including, especially, a ruling on its own jurisdiction that Midwest has sought.

[3] The Illinois case and the arbitration are not duplicative. The merits of any withdrawal liability dispute are committed mandatory arbitration. 29 U.S.C. § 1401. As a separate matter payments of withdrawal liability must commence immediately "notwithstanding any request for review or appeal" and must be made "until the arbitrator issued a final decision." 29 U.S.C. §§ 1399(c)(2)

Under ERISA withdrawal liability payments are to be made immediately and withdrawal liability disputes are to be resolved rapidly through mandatory arbitration. Nonetheless, two years after Central States made its demand for withdrawal liability from Midwest no payments have been made and no arbitration has been held.

REASONS FOR DENYING THE WRIT

Midwest believes that the United States District Court for the Northern District of Illinois lacks subject matter jurisdiction over a complaint filed by Central States against Midwest on April 26, 1994. Almost two years later that question has not been resolved because Midwest has used every procedural device at its disposal to prevent that Illinois district court from deciding the issue. Midwest did file a motion to dismiss or to transfer venue in that case but has resisted having that motion ruled upon by the Illinois court as long as it thinks it might get a different court to decide the question. Having failed in the courts below, Midwest now seeks to have this Court rule in effect on the motion to dismiss filed in that other case.

I. THE COURT BELOW PROPERLY DECLINED A FACTUAL INQUIRY ON A JURISDICTIONAL QUESTION PENDING BEFORE A DISTRICT COURT IN ANOTHER CIRCUIT; ITS RULING DOES NOT CONFLICT WITH OTHER CIRCUITS

Midwest filed its own complaint in the District of North Dakota on May 4, 1994. While Central States' first-filed

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and 1401(d), respectively. If the employer prevails in arbitration these payments are refundable with interest. 29 C.F.R. 2644.2(d). The Illinois case concerned only the collection of these "interim" payments and not the merits of the dispute. *See Trustees of Chicago Truck Drivers v. Central Transport*, 935 F.2d 114, 117 (7th Cir. 1991). Only after the arbitrator's final award is the district court entitled to reach the underlying dispute. *See Robbins v. Lady Baltimore Foods, Inc.*, 868 F.2d 258, 264 (7th Cir. 1989).

complaint seeks to collect withdrawal liability owed under 29 U.S.C. § 1381, Midwest's complaint seeks to have that statute declared unconstitutional as applied to Midwest. Since both complaints arose from the same subject matter,[4] they presented an apt case for application of the Eighth Circuit's "first-filed rule" to determine which of these two courts should decide the case. *See Northwest Airlines, Inc. v. American Airlines, Inc.*, 989 F.2d 1002, 1006 (8th Cir. 1993).

Midwest argues that while Central States' complaint was filed first, it was premature. Thus, Midwest argues, its own complaint was really first. Central States disagrees. Both parties filed motions to transfer the other's case to their chosen forum. The North Dakota court ruled first (on Midwest's complaint), holding that Central States' Illinois complaint was first-filed and that the North Dakota case should, therefore, be transferred to Illinois. In transferring the case the district court denied Midwest's motion to enjoin Central States from proceeding in Illinois. Midwest appealed this denial of the injunction. Midwest argued to the court below that the district court had abused its discretion in denying the injunction because it should have seen that the Illinois court lacked jurisdiction and, therefore, it should have refused to transfer the case.[5] Rejecting this argument, the Eighth Circuit affirmed the district court. The question before the Eighth Circuit was not really whether the Illinois court lacked jurisdiction. Rather the question was whether the North Dakota court abused its discretion in deferring to the Illinois court. Noting that Central States

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[4] Midwest's constitutional question is really just a defense to Central States' collection action. Midwest's action is maintained by virtue of the Declaratory Judgment Act, 28 U.S.C. § 2201.

[5] The transfer order by itself would not have been appealable. The appeal of the denial of the injunction provided Midwest a backdoor to an appeal of the transfer order under Eighth Circuit law. *See Emerson Elec. Co. v. Black & Decker Mfg. Co.*, 606 F.2d 234, 237 (8th Cir. 1979).

had properly pleaded subject matter jurisdiction, the Eighth Circuit found no abuse of discretion.

Distinguishing between a facial pleading of jurisdiction and the factual predicate for that jurisdiction, Midwest now argues that the Eighth Circuit should have found no factual predicate for jurisdiction in the Illinois court. What Midwest does not explain, however, is why the Eighth Circuit, rather than the Northern District of Illinois, should decide that question. Midwest cites this court's ruling in *KVOS, Inc. v. Associated Press*, 299 U.S. 269 (1936), as a basis for a factual inquiry into the subject matter jurisdiction of a district court, but Midwest fails to point out that that inquiry should take place in the district court where the complaint was filed. *KVOS* does not even remotely suggest that it would be appropriate for a different district court to make a factual inquiry into a case not before it. The same is true of the seven circuits with which Midwest claims the court below is in conflict. In each of those cases it fell to the district court with whom the case was filed to determine its jurisdiction. Midwest cites no case holding that a district court must (or even may) make a factual inquiry into the jurisdiction of another district court.

Thus Midwest has manufactured a conflict where there is none. The court below has left it to the Illinois district court to decide its jurisdiction. This is wholly consistent with all cases cited by Midwest. The Illinois court's ultimate decision may be appealed to the Seventh Circuit. It would be inappropriate for the Eighth Circuit to intervene.

The court below did all that was required of it. It considered an appeal of the denial of an injunction and found no abuse of discretion. It noted that Central States had properly pleaded the jurisdiction of the Illinois district court but did not make a factual inquiry into that pleading. The court below appropriately deferred further inquiry to the Northern District of Illinois.

II. THE DECISION OF THE COURT BELOW DOES NOT CONFLICT WITH OTHER CIRCUITS ON WHEN JURISDICTION FIRST ARISES OVER A WITHDRAWAL LIABILITY ACTION BECAUSE NONE HAVE DECIDED THAT QUESTION

Midwest also argues that the facts pleaded by Central States in its Illinois complaint do not support the jurisdiction of that court and that the Eighth Circuit should have noted this and ruled for Midwest. Of course this begs the question why Midwest has not pursued this point in the Northern District of Illinois instead of delaying that court for two years while Midwest tried to overturn a transfer order of a different court in a different case. In any event Midwest is simply wrong on its jurisdictional argument.

The statute, 29 U.S.C. § 1382, provides that a multiemployer pension plan like Central States faced by a withdrawal of an employer like Midwest "shall (1) determine the amount of the employer's withdrawal liability, (2) notify the employer of the amount of the withdrawal liability, and (3) collect the amount of the withdrawal liability from the employer." To Midwest, however, these words mean (1) determine the amount, (2) then write a letter to the employer demanding payment, and (3) then, and only then, sue the employer. Having changed the words of the statute to suit itself, Midwest then argues that a written demand letter is a jurisdictional prerequisite to a lawsuit to collect withdrawal liability. Midwest is wrong for several reasons.

First, the general rule is that even if a statutory requirement is mandatory, that does not in and of itself transform the requirement into a jurisdictional requirement. Thus, for example, although arbitration of withdrawal liability disputes is mandatory, the courts of appeals have uniformly held that courts do not lack subject matter jurisdiction over withdrawal liability cases brought to them before arbitration. *See e.g. McDonald v. Centra*, 946

F.2d 1059, 1063 (4th Cir. 1991). Jurisdiction under 29 U.S.C. § 1451 is established when a pension plan is adversely affected by the act or omission of a party under ERISA. Midwest admits it withdrew from Central States and thus, unless it succeeds on its constitutional challenge, Midwest owes Central States withdrawal liability that it has not paid. Thus, Central States had a cause of action because it was adversely affected by the withdrawal of Midwest, and, under 29 U.S.C. § 1451(a), Central States was entitled to sue Midwest even if it meant anticipating (correctly) by several days that Midwest would refuse to pay.

Second, there is no prerequisite of a written demand letter. The statute only requires notice to the employer. It does not say what form that notice must take, but only that it inform the employer of the amount and schedule of payments and demand payment. 29 U.S.C. § 1399 (b)(1). Here Central States filed a complaint that notified Midwest of the amount (¶ 9) and schedule of payments (¶ 10) and the complaint itself constituted the demand.[6] *See* Petition, Appendix F, at 18a-22a.

Several courts of appeals have considered precisely whether a judicial notice to an employer in the form of a complaint or claim in bankruptcy may fulfill the statutory notice requirements and have concluded it does. *Central States v. Slotky*, 956 F.2d 1369, 1379 (7th Cir. 1992) ("a technical violation of the bankruptcy rules would not invalidate the pension fund's filing as effective notice" under [MPPAA]"); *Bowers v. Transportacion Maritima*, 901 F.2d 258, 263 (2nd Cir. 1990) (notice effected by service of complaint). No court of appeals has held to the contrary.

Midwest further argues that a district court does not have jurisdiction over a matter until the cause of action has "accrued." Citing several courts of appeals, Midwest

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[6] Simultaneously Central States sent a demand letter to Midwest but either was sufficient to satisfy § 1399(b)(1).

argues that a withdrawal liability action does not accrue until an employer fails to timely pay the liability. Since, it argues, Central States filed its complaint against Midwest before the first payment of withdrawal liability was due, Central States' cause of action had not yet accrued, and the court lacked subject matter jurisdiction.

What Midwest overlooks is that "accrual" of a cause of action is not a jurisdictional term. In the cases cited by Midwest, the courts have asked what the latest date was upon which a cause of action accrues for purposes of the running of a statute of limitations. This is not the same question as what the earliest date was upon which a cause of action arose for purposes of bringing a lawsuit. None of the cases cited by Midwest holds that a pension plan may not sue earlier than the latest day on which the action for withdrawal liability accrues. Indeed several of these courts have entertained actions where the plan sued for payments pending arbitration (as Central States did here). *Penn Electric Co. v. United Retail and Wholesale Emp.*, 792 F.2d 45, 46 (3rd Cir. 1986); *Teamsters Joint Council No. 83 v. CenTra, Inc.*, 947 F.2d 115 (4th Cir. 1991); *Trustees of Chicago Truck Drivers v. Central Transport, Inc.*, 935 F.2d 114 (7th Cir. 1991). Under Midwest's theory that a cause of action does not accrue until after arbitration, each of these cases were without jurisdiction. Obviously the courts relied upon by Midwest do not treat the statute of limitations accrual rule as a jurisdictional rule as well.[7]

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[7] One court of appeals has held that the cause of action for withdrawal liabliity accrues for statute of limitations purposes on the date of the employer's withdrawal from the plan. *Bay Area Laundry v. Ferbar Corp.*, 73 F.2d 971 (9th Cir. 1996). Whether or not that court is right for purposes of the statute of limitations, it is certainly right for purposes of bringing a lawsuit. Here Midwest withdrew when its contributions ceased in August, 1991. Central States' lawsuit on April 25, 1994, was thus not premature. (The Ninth Circuit is in conflict with these other circuits on the statute of limitations question, but that issue is not presented by this case.)

Further, Central States sought declaratory and injunctive relief—a claim it was entitled to bring under 28 U.S.C. § 2201. A declaratory action will lie "whether or not further relief is or could be sought." *Id.* In a separate count Central States sought the withdrawal liability payments, the first of which was due only five days after the complaint was filed. In its complaint Central States also sought "An order compelling defendant Midwest to make its future withdrawal liability payments. . . ." Complaint: Petition Appendix F at 21a. There is no jurisdictional fault in this pleading.[8]

In any event the court below did not rule on this question, so it cannot be in conflict with other circuits. Noting that there was jurisdiction properly pleaded in the Illinois complaint, the court below left to the Illinois court to make such inquiry as to resolve its own jurisdiction. That sensible decision conflicts with no other court of appeals.

CONCLUSION

There is no conflict between the court below and any other court of appeals on the questions presented. The petition for certiorari should be denied.

Respectfully submitted

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[8] In addition Midwest became delinquent in its first payment five days after Central States filed its complaint. This was May 1, 1994, and three days before Midwest filed its complaint. If there were a jurisdictional question in the Illinois court before May 1, there certainly could be none after May 1.

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-3328NDBI

MIDWEST MOTORS EXPRESS, INC., *et al.*,
Appellants,

vs.

CENTRAL STATES SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND,
Appellee.

Appeal from the United States District Court
for the District of North Dakota

The motions for clarification of status of injunction are denied. The matter is a question of law for the United States District Court for the Northern district of Illinois to decide.

March 25, 1996

Order Entered at the Direction of the Court:

/s/ Michael E. Gay
Clerk, U.S. Court of Appeals, Eighth Circuit

FILED
APR 1 1996

No. 95-1431

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

MIDWEST MOTOR EXPRESS, INC., MME, INC., MIDNITE EXPRESS, INC. and EXPRESS CARTAGE, INC.,
Petitioners,
v.
CENTRAL STATES SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND AMICUS CURIAE BRIEF ON BEHALF OF THE REGULAR COMMON CARRIER CONFERENCE IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1431

MIDWEST MOTOR EXPRESS, INC., MME, INC., MIDNITE EXPRESS, INC. and EXPRESS CARTAGE, INC.,
Petitioners,

v.

CENTRAL STATES SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, the Regular Common Carrier Conference ("RCCC") moves for leave to file the brief *amicus curiae* in support of Petitioners, Midwest Motor Express, Inc., MME, Inc., Midnite Express, Inc. and Express Cartage, Inc.

The named Petitioners have consented in writing to the filing of a brief *amicus curiae* on behalf of the RCCC, and such consent has been filed with the clerk of this Court. Respondent has not consented.

The RCCC is a national, not-for-profit trade association, organized under the laws of the District of Columbia, whose members are motor carriers of property which transport predominately small, multiple shipments. This

association is affiliated with the American Trucking Associations, Inc. and was organized in 1938 to represent the particular needs of motor carriers transporting less-than-truckload freight. We do so by participating in legislative, regulatory and judicial proceedings, such as this one, that have substantial legal importance and financial impact on our transportation companies.

This association has 110 member trucking companies whose collective revenue in 1995 was approximately $10 billion. Of relevance to this judicial proceeding, our motor carrier members employ over 40,000 truck drivers and workers that belong to the International Brotherhood of Teamsters. The Petitioner, Midwest Motor Express, Inc. is a member of this association. These unionized motor carriers participate in one or more multiemployer pension plans, depending on the scope of their transportation service. Many of these unionized motor carriers contribute to the Central States Southeast and Southwest Areas Pension Fund ("Central States") whose conduct precipitated this petition when it commenced a lawsuit, before complying with notice and arbitration procedures of the Employee Retirement Income Security Act of 1974, ("ERISA") as amended by the Multiemployer Pension Plan Amendments Act of 1980, ("MPPAA") sections 4202, 4219 and 4221 (29 U.S.C. §§ 1382, 1399 and 1401).

As participants in multiemployer pension plans, RCCC members are subject to the withdrawal liability provisions of the MPPAA. Many of these employers participate in Central States, which is a large, severely underfunded multiemployer pension plan. These employers have no influence or control over the actions of the trustees of Central States in determining or increasing benefits since the trustees' sole fiduciary duty is to the employee participants. Consequently, the actions of Central States has resulted in substantial underfunding in the plan which has created withdrawal liability for employers that withdraw.

MPPAA was a major amendment to ERISA. It changed the rules on employers by subjecting them to an immediate withdrawal liability. The MPPAA sets forth detailed procedural, notice, conciliation and arbitration regulations to ameliorate the impact of withdrawal liability on employers. By filing a MPPAA withdrawal liability action before serving notice on Midwest, before Midwest's debt became due, before Midwest had an opportunity to cure, and before Midwest was in default, Central States flouted these procedural rules.

These statutory rules are critical for employers. They provide procedural due process of notice, the opportunity to evaluate a demand for withdrawal liability, to negotiate a settlement, if possible, and to arbitrate an unreasonable demand. These procedures provide checks and balances against unfair, unilateral action by plan trustees.

They are also designed to minimize litigation, by exhausting private and administrative remedies first. Litigation is a costly undertaking for employers, who are often in financial difficulty when a demand for liability occurs. Litigation is often much more onerous on an employer since the plan has more financial resources available. History has proven that the Central States plan is particular litigious. Consequently, it is essential that these statutory procedures, which afford employers due process, be adhered to by the trustees.

This case presents a critical question defining when a cause of action accrues under MPPAA. RCCC believes that the decision of the Court below, if permitted to remain in effect by a denial of Petitioner's Petition for Writ of Certiorari by this Court, will have a significant and substantial negative impact on the rights these MPPAA procedures provide to withdrawing employers.

Accordingly, amicus respectfully moves for leave to file the attached brief *amicus curiae* in support of Petitioners.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1431

MIDWEST MOTOR EXPRESS, INC., MME, INC., MIDNITE EXPRESS, INC. and EXPRESS CARTAGE, INC.,
Petitioners,

v.

CENTRAL STATES SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

AMICUS CURIAE BRIEF ON BEHALF OF THE REGULAR COMMON CARRIER CONFERENCE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The Regular Common Carrier Conference is a national, not-for-profit trade association whose members are motor carriers of property which transport predominately small, multiple shipments. This association is affiliated with the American Trucking Associations, Inc. and was organized in 1938 to represent the particular needs of motor carriers transporting less-than-truckload freight. We do so by participating in legislative, regulatory and judicial proceedings, such as this one, that have substantial legal and financial importance to our transportation companies.

This association has 110 member trucking companies whose collective revenue in 1995 was approximately $10 billion. Of relevance to this judicial proceeding, our motor carrier members employ over 40,000 truck drivers and workers that belong to the International Brotherhood of Teamsters. The Petitioner, Midwest Motor Express, Inc. is a member of this association. These unionized motor carriers participate in one or more multiemployer pension plans, depending on the scope of their transportaiton service. Many of these unionized motor carriers participate in the Central States Southeast and Southwest Areas Pension Fund ("Central States"), whose conduct precipitated this petition when it commenced a lawsuit, before complying with notice and arbitration procedures of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") sections 4202, 4219 and 4221 (29 U.S.C. §§ 1382, 1399 and 1401).

As participants in multiemployer pension plans, RCCC members are subject to the withdrawal liability provisions of the MPPAA. Many of these employers participate in Central States, which is a large, severely underfunded multiemployer pension plan.[1] These employers have no influence or control over the actions of the trustees of Central States in determining or increasing benefits since the trustees' sole fiduciary duty is to the employee participants.[2] Consequently, the actions of Central States have resulted in substantial underfunding and has created withdrawal liability for employers that withdraw.

MPPAA was a major amendment to ERISA. It changed the rules on employers by subjecting them to an

---

[1] Central States had an unfunded, vested liability of approximately $2.38 billion in 1992. See attached Appendix.

[2] *See NLRB v. Amax Coal Co.*, 453 U.S. 322, 329-30 (1981).

immediate withdrawal liability.[3] The MPPAA set forth detailed procedural, notice, conciliation and arbitration regulations to ameliorate the impact of withdrawal liability on employers. By filing a MPPAA withdrawal liability action before serving notice on Midwest, before Midwest's debt became due, before Midwest had an opportunity to cure, and before Midwest was in default, Central States flouted these procedural rules.

These statutory rules are critical for employers. They provide procedural due process of notice, the opportunity to evaluate a demand for withdrawal liability, to negotiate a settlement, if possible, and to arbitrate an unreasonable demand. These procedures provide checks and balances against unfair, unilateral action by plan trustees.

They are also designed to minimize litigation, by exhausting private and administrative remedies first. Litigation is a costly undertaking for employers, who are often in financial difficulty when a demand for liability occurs. Litigation is much more onerous on an employer since the plan has more financial resources available. History has proven that the Central States plan is particular litigious. Consequently, it is essential that these statutory procedures, which afford employers due process, be adhered to by the trustees.

The Supreme Court should take this opportunity to enforce MPPAA's procedural rules on Central States because the issue presented herein is one of fundamental due process and fairness in handling withdrawal liability issues. It has broad applications to all employer contributors to multiemployer pension plans. Accordingly, *amicus*

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[3] *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 725 (1984). Prior to MPPAA, if PBGC did choose to extend a guarantee when a multiemployer plan terminated with insufficient assets to pay promised benefits an employer that had contributed to the plan in the five preceding years was liable to PBGC for the shortfall in proportion to its share of contributions during that five-year period, up to 30 percent of the employer's net worth. 29 U.S.C. §§ 1362(b), 1364 (1976 ed.).

have a vital interest in the resolution of the MPPAA issue raised in this case:

> Whether a multiemployer pension plan may file a MPPAA withdrawal liability action before the plan has served notice on the employer, before the debt becomes due, before the employer has an opportunity to cure, and before the employer is in default?

Amicus RCCC believes it will bring insights and information beyond what is presented by Petitioner and Respondent, which will be useful to this Court in deciding the issues presented.

ARGUMENT

I. MPPAA REQUIRES A PLAN TO PROVIDE NOTICE AND A DEMAND FOR PAYMENT TO AN EMPLOYER BEFORE COMMENCING A LAWSUIT.

In its petition, Midwest set forth the undisputed facts in this case which demonstrate that Central States commenced its civil action the same day it mailed its notice and demand to Petitioner. The lawsuit was initiated before any withdrawal liability was due.

MPPAA specifically requires a plan to adhere to the following procedure: (1) determine the amount of the employer's withdrawal liability, 29 U.S.C. §§ 1382, 1391; (2) send the employer a notice and demand for payment, 29 U.S.C. § 1399(b)(1); (3) wait the statutory 60-day period to see whether the employer will pay, 219 U.S.C. § 1399(c)(2); (4) declare a statutory default and wait another 60 days to determine if the failure to pay is cured, 29 U.S.C. § 1399(c)(5)(A); and (5) sue to collect within six years. 29 U.S.C. § 1451(f)(1).

Central States' collection action was unauthorized by the enforcement provisions of MPPAA. First, ERISA Section 4301b) [29 U.S.C. 1451(b)] makes it clear that an action to compel payment is only appropriate if the

employer has failed to make withdrawal liability payments within the time prescribed.

Second, the jurisdictional provision of the MPPAA provides, in part:

> A plan fiduciary, employer, plan participant, or beneficiary, *who is adversely affected* by the act or omission of any party under this subtitle [29 U.S.C. §§ 1381 *et seq.*] with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.

29 U.S.C. § 1451(a)(1) (emphasis added). Until an employer has failed to make a demanded payment, and failed to cure, withdrawal in itself "does not visit any adverse affect upon the plan that gives rise to [a] cause of action." *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119, 1123 (D.C. Cir. 1989). The collection action was premature and not ripe and, thus, the Illinois district court lacked subject matter jurisdiction. *St. Clair v. Chico*, 880 F.2d 199, 201-02 (9th Cir. 1989). Until Central States was adversely affected by Midwest's failure to make a withdrawal liability payment, there was no statutory basis upon which to claim jurisdiction in Central States' collection action. 29 U.S.C. § 1451(a). Therefore, the collection action was premature and in violation of MPPAA.

II. THE ISSUE PRESENTED HERE WILL REOCCUR REPEATEDLY ABSENT REVIEW BY THIS COURT.

Midwest has demonstrated in its brief that there is a conflict in the circuit courts on the issue presented herein. (Petition at 12-16). The Eighth Circuit's decision is inconsistent with the holdings in the four other circuits that have addressed this issue. Therefore, compelling reasons exist to grant the Petition for Writ of Certiorari and define when a cause of action under MPPAA accrues.

Moreover, this issue is likely to arise repeatedly in the future for a number of reasons. First, Central States operates in twenty-four states and receives contributions from a large number of companies.[4] The sheer size and number of employer contributors together with the large geographic expanse of the Central States plan ensures that the issue will reoccur in the future.

Second, the Central States plan is the most underfunded multiemployer pension plan in the nation, according to the Pension Benefit Guaranty Corporation. Central States' liabilities for vested benefits exceeded its assets by approximately $2.38 billion in 1992. This significant underfunding operates to trigger withdrawal liability on withdrawing employers.

Third, the adverse financial condition in the trucking industry has caused numerous trucking companies to cease operations and triggered withdrawal liability. Since 1980, many unionized companies, employing over 100,000 Teamster workers, have ceased operation. The trucking industry today is extremely competitive today. By all financial measures—profit margins, returns on investment or equity, and revenue per shipment—the industry is under financial stress. This is particularly true for the less-then-truckload segment presented by the unionized carriers. They are the higher cost motor carriers and consequently a significant number are operating with either a slim one or two percent profit margin or at a loss. Simply put, they live, month to month, with the possibility that they too may confront a withdrawal liability assessment in the future.

Besides cessation of business, there are a variety of activities that could trigger a withdrawal liability assess-

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[4] Central States operates in twenty-four states: Alabama, Arkansas, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, North Dakota, North Carolina, Ohio, Oklahoma, South Dakota, South Carolina, Tennessee, Texas and Wisconsin.

ment. They include decertification of the union by the employees of the company,[5] pension fund expulsion,[6] or a disclaimer of interest by the union in the bargaining unit employees.[7] Consequently, there are numerous circumstances beyond the control of the employers that can trigger an involuntary withdrawal assessment.

Fourth, there are ten other multiemployer plans, with trucking company participants, that are currently underfunded, according to the PBGC. See Appendix. The enormous underfunding in these trucking plans poses a significant liability problem for the employer participants, if an event occurs that triggers a withdrawal liability assessment. Therefore, this case has broad ramifications beyond the Central States plan, as well as beyond trucking companies. It is vital that motor carrier employer's rights, as set forth in MPPAA, be safeguarded to protect them from unwarranted or unreasonable demands for payments by plan trustees.

CONCLUSION

Absent review by this Court, Central States will follow the same procedure in the future by lodging lawsuits in the Northern District of Illinois to secure a more favorable forum and litigation advantage because of this ruling by the Eighth Circuit. This will work a hardship on the employers, like Petitioner.

Consequently, it is vital that these pension plans are required to comply with the notice, assessment, conciliation and arbitration procedures to ensure the due process rights of employers are complied and maintained as es-

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[5] *Marvin Hayes Line, Inc. v. Central States Pension Fund,* 814 F.2d 297 (6th Cir. 1987).

[6] *Robbins v. Kohn Beverage Co.,* Slip Op., No. 84 C 3507 (DC ND IL 1985).

[7] *Western Teamster Pension Fund Trustees v. Thompson Bldg. Materials, Inc.,* 749 F.2d 1396 (9th Cir. 1984).

tablished by Congress in ERISA, as amended by MPPAA.

Without requiring multiemployer plans to strictly enforce the MPPAA procedural rules, the decision below exposes contributing employers to duplicative litigation that inevitably results from the transfer of an action to a court that may lack subject matter jurisdiction. Unless this Court establishes uniformity, valuable time, money and court resources will continue to be wasted.

Amicus submits that the decision of the Eighth Circuit is incorrect, and should be reversed. This Court should grant certiorari to define when a cause of action accrues under MPPAA in order to provide guidance to and uniformity among the circuit courts.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX

UNDERFUNDED MULTIEMPLOYER PENSION PLANS[1]

SPONSOR	YEAR	ADJ UVB
Central States Teamsters	1992	$2,383,062,415
Sheet Metal Workers	1992	925,383,787
NYSA ILA Pension	1992	520,671,831
New England Teamsters	1992	495,267,928
Int Ladies Garment Wkrs	1992	488,501,324
UMW 1974 Plan	1992	427,291,363
Amalgamated Ins Fund	1991	289,123,070
S.Cal. Constr. Laborers	1992	288,302,057
Maj. Lg. Baseball Players	1991	249,731,627
Philadelphia Teamsters	1992	235,407,169
ILWU-PMA Pension Fund	1991	209,415,859
New York State Teamsters	1992	189,385,205
Operating Engineers	1991	122,727,365
Alaska Teamsters	1992	113,581,332
Western PA Teamsters	1991	109,754,736
Bricklayers & Trowel Trades	1991	94,467,466
District 65	1992	87,731,068
Northern California Carpenters	1991	87,286,701
Joint Electrical Ind. Bd.	1991	78,284,092
Central PA Teamsters	1992	75,597,126
S. Cal. Plumbing Heat & Piping	1992	73,179,801
Hawaii Carpenters	1991	71,775,699
No. Jersey Trucking Employees	1992	71,026,505
Milwaukee Brewery Workers	1992	69,603,083
Warehouse Employees Local 169	1992	65,722,853
UFCW Tri-State Pension	1992	60,496,850
Building Service 32B	1992	58,738,050
IUOE Locals 17, 106, 410, 463, 545	1992	55,028,169
Mass. Laborers	1991	53,720,486
Machinists District No. 15	1992	53,390,324
IUOE Locals 15, 15A, 15C, 15D	1992	52,884,146

[1] SOURCE: PBGC data generated from IRS Form 5500 transaction tapes. Liabilities were adjusted by PBGC using a common interest rate of 7.25 percent. ADJ UVB = Adjusted Unfunded Vested Benefits.

SPONSOR	YEAR	ADJ UVB
NY Hotel Trades	1992	51,050,480
Mass. State Carpenters	1992	46,550,060
Milwaukee Building Trades	1991	44,120,929
Buffalo Carpenters	1991	41,231,561
Const. Ind. Laborers Dist. Cncl.	1991	40,352,818
Western States Food Processing	1992	34,870,554
Local 478 Trucking & Allied	1992	33,024,399
Hoisting Engineers Local 513	1992	32,757,278
Norther Calf. Laborers	1991	30,067,795
IBT Local 705	1992	25,273,124
SEIU Local 74 Pension Fund	1992	20,217,715
Freight Drivers Local 557	1992	14,761,536
Teamsters Jt. Cncl. No. 83 of VA	1992	12,117,221
Elec. Contractors Local 134, IBEW	1992	7,282,174
New York City Carpenters	1992	4,160,008

Supreme Court, U.S.
FILED
APR 17 1996
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CENTRAL STATES, SOUTHEAST AND
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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY BRIEF

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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITIONERS' REPLY BRIEF

INTRODUCTION

Midwest Motor Express, Inc., MME, Inc., Midnite Express, Inc. and Express Cartage, Inc. ("Midwest") file this reply brief in response to the brief in opposition filed by Central States Southeast and Southwest Areas Pension Fund ("Central States"). Midwest incorporates the points and authorities raised and argued in its Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

I. THE COURT BELOW IMPROPERLY DECLINED A FACTUAL INQUIRY ON A JURISDICTIONAL QUESTION IN A CASE WHICH ON ITS FACE WAS NOT RIPE FOR FILING.

Central States mischaracterizes the nature of the issues presented to the Eighth Circuit on the question of the first-filed rule. The question before the Eighth Circuit was whether both the U.S. District Court for the Northern District of Illinois and the U.S. District Court for the District of North Dakota had subject matter jurisdiction over their respective cases.[1] A transfer under the first-filed rule assume jurisdiction in both courts involved in the transfer. The transferring court has a duty to examine this assumption of jurisdiciton before making the transfer. Clearly, the Illinois court did not have subject matter jurisdiction over a case which, on its face, was not ripe for filing.[2] Therefore, the case should not have been transferred.

Central States contends that the two complaints were appropriately considered by the Eighth Circuit in an analysis of the first-filed rule. *See* Brief in Opposition, p. 5. Central States then argues it was appropriate for the Eighth Circuit, in applying the first-filed rule, to fail to make a factual inquiry into the jurisdictional basis of the Illinois complaint simply because it was filed in another circuit. It is precisely the Eighth Circuit's failure to make that determination that made it impossible for that court to apply the first-filed rule in a meaningful

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[1] Midwest will hereinafter refer to the Northern District of Illinois and its case as the "Illinois court" and "Illinois action," and to the District of North Dakota and its case as the "North Dakota court" and "North Dakota action".

[2] *See* Central States' complaint, paragraph 10, App. F, p. 19-20, where the Complaint, filed on April 26, 1994, admits that Central States issued its Notice and Demand for Payment of Withdrawal Liability *on the same date,* April 26, 1994.

fashion. The argument turns the first-filed rule into one of mechanical application that might as well be made by a clerk, not by a judge.

In its Brief in Opposition Central States argues that

> [s]ince both complaints arose from the same subject matter, they presented an apt case for application of the Eighth Circuit's 'first-filed rule' to determine which of these two courts should decide the case. *See Northwest Airlines, Inc. v. American Airlines, Inc.*, 989 F.2d 1002, 1006 (8th Cir. 1993) (footnote omitted).

However, the "first-filed" rule is a rule of *judicial* construction under Section 1404(a) which permits that district court whose jurisdiction first attached to hold its jurisdiction to the exclusion of other courts until the first court has performed its duty and, for the convenience of witnesses and parties, to transfer the latter action to the court where the first action is pending. *Northwest Airlines, Inc. v. American Airlines, Inc.*, 989 F.2d 1002, 1004-07 (8th Cir. 1993). As always in federal court, jurisdiction is of primary importance. The precondition to transfer is that *both* district courts have jurisdiction. This prerequisite is so important in fact, that the "first-filed" rule is, in reality, a "first-to-obtain-jurisdiction" rule. As recently formulated by the Eighth Circuit itself, the first-filed rule is a rule that "gives priority, for purposes of choosing among possible venues when parallel litigation has been instituted in separate courts, *to the party who first establishes jurisdiction.*" *Northwest*, 989 F.2d at 1006 (emphasis added).

As set forth in its petition (*See* pp. 15-16), Midwest was the party which first established jurisdiction. By declining a factual inquiry on a jurisdictional question pending in a case which on its face was not ripe for filing, the decision below conflicts with decisions by seven other circuits regarding the appropriate scrutiny to be used during a threshold examination of subject matter juris-

diction. *See* Petition for Certiorari, pp. 16-20. Not surprisingly, Central States fails to explain why the judicial analysis should be less rigorous in a transfer context than in the ordinary federal case. Common sense and judicial economy suggest that scrutiny of jurisdictional allegations is more, not less, important in transfer cases, particularly when a race to the courthouse is involved.

Case law does not limit jurisdictional examinations to only those instances where the cases are filed in district courts in the same circuit. The mere fact that a matter is filed in a court in another circuit cannot keep a court from making that evaluation of a critical threshold issue. Absent that evaluation, parties like Central States are free to forum shop in the most obvious and egregious manner and to file actions not yet ripe for consideration prior to the accrual of the cause of action, as long as they do it in a district separate from that in which the defendant was likely to file an action. In fact, the probability of such forum shopping makes it that much more important that a court consider the subject matter jurisdiction of both courts when applying the first-filed rule, regardless whether one of the two actions being considered was filed in another circuit.

Waiting, as Central States suggests, for the transferee court to make the determination regarding jurisdiction is not an adequate remedy because it adds substantial costs and delay to litigation that could otherwise proceed to judgment in the transferring court.

II. THERE IS A CONFLICT WITH THE DECISION OF THE COURT BELOW ON WHEN JURISDICTION FIRST ARISES OVER A WITHDRAWAL LIABILITY ACTION.

Once again, Central States focuses on form over substance, when it contends that the Eighth Circuit's decision does not represent a conflict or inconsistency with the decisions reached in other jurisdictions on this issue.

Central States admits that it filed its Illinois case before Midwest received its notice and demand for withdrawal liability and before payments under the notice and demand were to become due. See Brief in Opposition, p. 2. The impact of the Eighth Circuit's decision is that it effectively recognized the validity of an action which, on its face, was not ripe for filing. This is in direct contradiction of the holdings of every other circuit that has considered the issue of when a cause of action accrues under MPPAA. *See Debreceni v. George Lamoureaux & Co.*, 629 F. Supp. 598, 601 (D. Mass. 1986), (notice and demand are preconditions for a suit to collect withdrawal liability); *ILGWU Nat'l Retirement Fund v. Levy Bros. Frocks*, 846 F.2d 879, 887 (2d Cir. 1988) (remanded a case for determination of whether the conditions precedent to a suit for collection of withdrawal liability have been met); *Board of Trustees of District No. 15 Machinists' Pension Fund v. Kahle Engineering Corp.*, 43 F.3d 852, 860 (3d Cir. 1994) (cause of action arose when employer failed to make payment on its withdrawal liability demanded by the plan sponsor . . . the action which "adversely affected" the plan was the failure to make the scheduled payment); *Republic Industries v. Teamsters Joint Council*, 718 F.2d 628, 641 n.15 (4th Cir. 1983) (notice and cure periods are part of the statutory scheme designed to provide due process to withdrawing employers); *Central States Pension Fund v. Slotky*, 965 F.2d 1369, 1371 (7th Cir. 1992) ("[t]o trigger application of the statute, the pension plan must issue a notice and a demand for payment of withdrawal liability to the employer). Therefore, to the extent that the Eighth Circuit allowed Central States to file the Illinois case before notice was sent to Midwest and before payments became due, there is a conflict with the Eighth Circuit's decision on the question of when jurisdiction first arises over a withdrawal liability action.

Essentially, Central States argues that the decision of the Court below does not conflict with other circuits on

when jurisdiction first arises over a withdrawal liability action:

> Jurisdiction under 29 U.S.C. § 1451 is established when a pension plan is adversely affected by the act or omission of a party under ERISA. Midwest admits that it withdrew from Central States and thus, unless it succeeds on its constitutional challenge, Midwest owes Central States withdrawal liability that it has not paid. Thus, Central States had a cause of action because it was adversely affected by the *withdrawal of Midwest,* and, under 29 U.S.C. § 1451(a), Central States was entitled to sue Midwest even if it meant anticipating (correctly) by several days that Midwest would refuse to pay. (Emphasis added.)

See Brief in Opposition, p. 8. But Central States ignores the decisions in *Joyce v. Clyde Sandoz Masonry,* 871 F.2d 1119 (D.C. Cir. 1989) and *Kahle Engineering Corp., supra* at 860. In *Joyce,* the Court of Appeals for the District of Columbia held that withdrawal in itself "does not visit any adverse affect upon the plan that gives rise to [a] cause of action." 871 F.2d at 1123. Until Central States was adversely affected by the act or omission of Midwest, there was no statutory basis upon which to lay jurisdiction in Central States' Illinois action. 29 U.S.C. § 1451(a).[3] When Central States' filed its Illinois action, the cause of action had not yet accrued.[4] Thus,

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[3] It is the uncured failure by an employer to pay the sum demanded that adversely affects a plan and triggers a cause of action. *Joyce,* at 1122. Midwest has never maintained that a cause of action failed to arise merely because Central States failed to mail a "written demand letter." Central States' argument in this regard is a mere straw man. Brief in Opposition at 8.

[4] The Court of Appeals for the District of Columbia was required to determine what act or omission gives *rise* to a cause of action in order to determine what act or omission triggers the statute of limitations' time bar as applied to efforts to collect withdrawal liability. *Joyce* at 1122. This belies Central States' mischaracterization of Midwest's citations as statute of limitations' cases that do not examine the earliest date upon which a cause of action arises for purposes of bringing a lawsuit. *See*

the Illinois action was premature, not ripe, and, therefore, the district court lacked subject matter jurisdiction. *St. Clair v. City of Chico*, 880 F.2d 119, 201-02 (9th Cir. 1989). Accordingly this Court should grant Petitioner's Writ for Certiorari.

III. MPPAA REQUIRES A PLAN TO PROVIDE NOTICE AND A DEMAND FOR PAYMENT TO AN EMPLOYER BEFORE COMMENCING A LAWSUIT.

Central States argues that the statutory requisites essentially have no meaning when it comes to the determination of when a cause of action is ripe or when a court is vested with subject matter jurisdiction. Specifically, Central States argues that the pension fund can provide notice of withdrawal liability to an employer in anticipation of a refusal to pay in the form of a legal action filed in federal court alleging a default that has not yet occurred. Brief in Opposition at 8.

Central States' citation to *Bowers v. Transportation Maritima*, 901 F.2d 258 (2nd Cir. 1990), in support of its position that a federal court complaint itself constitutes sufficient notice under the MPPAA, is absurd. The *Bowers* decision stands for no such proposition. In *Bowers*, notice and demand for payment *was issued and served, twice*, some six months *before* the collection action in federal court was filed. However, a dispute arose as to whether the notices and demands for payment were properly served on the employer. Apparently in order to avoid protracted litigation of that factual dispute, the fund in that case agreed to treat the date of service of process of its complaint in federal court as the first payment due date. *Transportation Maritima*, 901 F.2d at 265. Those

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Brief in Opposition, p. 9. The answer to the question of what act or omissions gives rise to a cause of action is the same for both issues: determine when a cause of action accrues (1) for purposes of the running of a statute of limitations or (2) for purposes of bringing a lawsuit.

unique circumstances are clearly distingishable from the facts here, and Bowers certainly cannot be cited for a general proposition that a collection complaint may be substituted for notice and demand of withdrawal liability under the MPPAA scheme, which unequivocally requires determination and notification of withdrawal liability before any effort to collect is undertaken. 29 U.S.C. § 1382.

Furthermore, Central States' citation to *Central States v. Slotky*, 956 F.2d 1369 (7th Cir. 1992) in support of its position that a claim in bankruptcy may fulfill the statutory notice requirements equally is absurd. There were two notices in *Slotky*, the first a claim in bankruptcy and the second a true notice and demand. *Id.* at 1372. The Court of Appeals did not find that the first claim in bankruptcy fulfills the statutory notice requirements as Central States claims. Instead, the Court of Appeals found:

> There is a deeper objection to Slotky's argument concerning the adequacy of the plan's bankruptcy claim as notice under the Multiemployer Pension Plan Amendments. The objection is the second notice and demand to Stevens, the one sent directly, that is, outside the bankruptcy proceeding. *That notice makes the bankruptcy filing academic.*

(Emphasis added). *Id.*, at 1375.

The requirements set forth in MPPAA are not mere "technical" requirements that can be avoided. Accrual of a cause of action goes directly to the issue of when the cause of action arises under the law.[5] It also indicates

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[5] Central States also argues that Midwest became delinquent in its first payment five days after Central States filed its Complaint and, therefore, if there were a jurisdictional question in the Illinois court before May 1, there certainly could be none after May 1. Brief in Opposition at 10, n.8. Central States is wrong. The jurisdictional infirmity afflicting Central States Illinois action

when an action is ripe for consideration by a court. Central States did not simply violate a technical requirement and fail to do one of the things required by the statute. Central States failed to do *any* of the things required by the statute, and had not been adversely affected within the meaning of MPPAA, when it rushed to the courthouse to secure a more favorable forum in which to litigate its claim for withdrawal liability against Midwest. The abuse of an already-overburdened court system with the disregard for the MPPAA requirements on which all parties are supposed to rely, warrants this Court's consideration of the Petition for Certiorari filed by Midwest. Midwest respectfully submits that the Court should accept its petition and consider the issue presented on its merits.

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could not have been cured by the mere passage of time, on or after May 1, 1994. An action cannot be maintained if it is commenced before the accrual of the cause of action on which it is based, even where the cause of action accrues before the trial. 1 Am. Jr. 2d, Abatement, Survival, and Revival § 4. Further:

> Whether a cause of action has accrued is determined *according to the facts existing at the time the action was commenced.* Where an action has been commenced before the alleged cause of action has accrued, the subsequent occurrence of conditions or facts necessary to make the cause of action complete will not avail the plaintiff in maintaining his suit.

1 Am. Jr. 2d, Actions § 71 (emphasis added). (Courts may consider common law doctrines, like abatement, because of the power of the courts to develop a "federal common law" of ERISA. *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1499 (9th Cir. 1984) (development of federal common law under ERISA is necessary to fill in the gaps in the statutory scheme). Indeed, the doctrine of abatement has been relied upon by the U.S. Court of Appeals for the Sixth Circuit pursuant to this principal. *Corbin v. Blankenburg*, 39 F.3d 650, 653 (6th Cir. 1994)). Central States cannot avoid the jurisdictional defects in its Illinois action by characterizing its action as anticipatory. See Brief in Opposition, p.8. The irrefutable facts are that Central States filed this action on April 26, 1994, and its cause of action had not yet accrued on that date.

CONCLUSION

The petition for writ of certiorari should be granted to establish when a cause of action accrues under MPPAA and to establish a uniform methodology for application of the first-filed rule.

Respectfully submitted,

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